Office - Supreme Court, U.S.
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JUN 28 1982
ALEXANDER L. STEVAS
CLERK

81-2384

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GENERAL LONGSHORE WORKERS, ILA,
LOCALS 1418 and 1419,
Petitioners,

v.

FALLON W. BENTZ, Acting Regional Director of the Fifteenth Region of the National Labor Relations Board,
Respondent,

and

GREAT SOUTHERN, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Did the district court exceed its authority under Section 10(*l*) of the Labor Management Relations Act by awarding affirmative monetary relief following a final decision on the underlying unfair labor practice by the NLRB which had denied the same relief?

PARTIES TO THE PROCEEDINGS BELOW

Fallon W. Bentz, Acting Regional Director, Region 15, National Labor Relations Board

General Longshore Workers, ILA, Locals 1418 and 1419 (now merged—Local 3000)

New Orleans Steamship Association

Panama City Port Authority

Great Southern Paper Company

International Navigation, Ltd.

Central Gulf Lines, Inc.

Alley & Alley, Chartered

Sale, Bryant, Thompson & Kurvin

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GENERAL LONGSHORE WORKERS, ILA,
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FALLON W. BENTZ, Acting Regional Director of the Fifteenth Region of the National Labor Relations Board,
Respondent,

and

GREAT SOUTHERN, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, General Longshore Workers, ILA, Locals 1418 and 1419 (now merged—Local 3000), pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above-titled case.

REPORT OF THE OPINIONS BELOW

The opinions of the district court and of the court of appeals are not reported. They are reproduced as Appendices A-G.

JURISDICTION

The court of appeals issued its judgment denying petitioners' appeal on March 29, 1982. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 10(*l*) of the Labor Management Relations Act, 1947, 61 Stat. 146 *et seq.*, 29 U.S.C. § 160(*l*), provides in pertinent part as follows:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law. . .

STATEMENT OF THE CASE

This matter arose pursuant to unfair labor practice charges filed by the Panama City Port Authority ("Panama City"), respondent herein, with the Fifteenth Region of the National Labor Relations Board ("NLRB") in April 1975. Panama City alleged that the collective bargaining agreement between the General Longshore Workers, ILA, Locals 1418 and 1419 ("Unions"), petitioners herein, and the New Orleans Steamship Association ("NOSSA") contained an illegal "hot cargo" provision. The disputed provision, which had been in effect

since October 1, 1974, required the employers to pay to the NOSSA-ILA Pension Welfare Vacation and Holiday Funds ("Trust Funds") a royalty based on tonnage for all cargo which was loaded into or discharged out of LASH/SEABEE cargo containers by non-ILA labor.

The General Counsel of the NLRB issued a complaint aganist the Unions alleging that they had violated Sections 8(b)(4)(ii)(A) and (B) and Section 8(e) of the Labor Management Relations Act, 1947, ("the Act")[1] by negotiating and enforcing the royalty provision.

Under the authority of Section 10(*l*) of the Act, the Acting Regional Director for the Fifteenth Region of the NLRB, respondent herein, petitioned the United States District Court for the Eastern District of Louisiana for an injunction to prohibit the continued enforcement of the disputed contract provision. On March 15, 1976, the district court issued a memorandum and order (Appendix G) finding that there was "reasonable cause to believe" that the royalty provision violated Section 8(e) of the Act, enjoining the parties from enforcing the royalty provision and requiring that the parties establish a method of determining during the pendency of the NLRB proceedings the tonnage of LASH/SEABEE cargo containers subject to the royalty clause.

Shortly thereafter, the Unions and NOSSA moved the court to modify its injunction to provide that all funds due under the royalty provision be deposited in the court's registry so that the funds would be available for distribution in accordance with the NLRB's order. On June 28, 1976, pursuant to these motions, the district court entered a second order (Appendix F) in which, relying upon an order entered in a similar case by the United States District Court for the Southern District of Alabama,[2] it modified its initial injunction by requir-

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[1] 29 U.S.C. § 158(b)(4)(ii)(A) and (B) and § 158(e).

[2] *Bentz v. International Longshoremen's Association, Local 1410 (Longshore Division)*, C.A. No. 75-507-H (S.D. Ala. 1976).

ing the parties to deposit into the district court's registry all funds collected or due under the royalty provision since the date of the initial injunction. The district court reasoned that this was the "most equitable means to maintain the status quo pending final determination by the NLRB."

In compliance with the latter order, both NOSSA and the Administrator of the Trust Funds deposited into the district court's registry all monies collected or due pursuant to the royalty provision since March 15, 1976. Those monies remained in the court's registry and were invested in United States treasury bills earning the prevailing rate of interest.[3]

After the issuance of the Section 10(*l*) injunction by the district court, the unfair labor practice complaint was litigated before the NLRB. Both the General Counsel of the NLRB and the charging party, Panama City, demanded that the NLRB direct reimbursement of all funds collected pursuant to the challenged royalty provision to those employers who had paid the royalties. The Administrative Law Judge ("ALJ") found that the royalty provision violated Section 8(e) of the Act[4] but expressly denied reimbursement of the monies paid pursuant to the provision. The ALJ reasoned that:

> As the royalties paid by these employers were not involuntarily exacted from them by unlawful means but were sanctioned by the contract to which they voluntarily agreed, I deem it inappropriate to grant the General Counsel's request.

On March 17, 1978, the NLRB adopted the ALJ's recommended decision and order *in toto*.[5] No appeal was

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[3] At the time of the court of appeals' decision, the amount of the royalty payments plus interest which had accumulated in the district court's registry was approximately $1.6 million.

[4] The ALJ recommended that the Section 8(b)(4)(ii)(A) and (B) charges be dismissed.

[5] *Longshoremen, ILA, Locals 1418 and 1419 (New Orleans Steamship Assn.)*, 235 NLRB 161 (1978).

taken from the NLRB's order, and thus it is now final. As required by the order, the royalty provision is no longer in effect.

After issuance of the NLRB order, proceedings were renewed in the district court. On April 6, 1979, the district court dissolved the Section 10(*l*) injunction and permitted Panama City, Great Southern Paper Co. Ltd., International Navigation, Ltd., and Central Gulf Lines, Inc., respondents herein, to intervene on the issue of the proper distribution of the funds held in the court's registry. (Appendix E). Addressing the disposition of those funds, the district court reasoned that the funds had been held in the court's registry "to protect the interests of all parties, pending the Board's adjudication" and that since the NLRB had found the royalty provision unlawful, the funds should be returned to those who paid them. As to the NLRB's refusal to grant reimbursement, the district court held that the NLRB's order was not "applicable to the funds deposited in the registry of the court and thus [the NLRB's order had] no effect with respect to the final disposition of those funds." [6]

The determination of an actual allocation of the funds to the various stevedore and shipping companies which made payments into the court's registry was referred to a United States Magistrate serving as a Special Master. (Appendix E). After proceedings before the Magistrate, his findings and recommendations regarding distribution

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[6] Respondents argued below that the Unions' position after the NLRB decision conflicts with their position taken at the time that the Section 10(*l*) injunction was issued. At that time, both the Unions and NOSSA justified modifying the Section 10(*l*) injunction to require that the royalty payments be paid into the district court's registry on the grounds that if this were done the monies held in the court's registry would be readily available to be distributed to the contributors if the Unions did not "prevail" before the NLRB. Clearly, the Unions did "prevail" at the NLRB on the crucial issue of reimbursement, and thus, their position has been consistent throughout this litigation.

of the monies were issued on March 27, 1980. (Appendix D). The district court adopted the Magistrate's findings and recommendations, and judgment was entered accordingly on January 20, 1981. (Appendices B and C).

Petitioners herein appealed to the United States Court of Appeals for the Fifth Circuit which affirmed the district court's judgment on March 29, 1982. (Appendix A).

REASONS FOR GRANTING THE WRIT

This Case Involves An Important Federal Question Which Should Be Decided By This Court

This case presents an important question concerning the relationship between a district court's authority to grant relief under Section 10(*l*) of the Act and the NLRB's authority to determine the appropriate remedy for unfair labor practices pursuant to Section 10(c) of the Act, 29 U.S.C. § 160(c).[7] Specifically, the issue presented for review is whether a district court under Section 10(*l*) of the Act may award affirmative monetary relief following a final decision on the underlying unfair labor practice by the NLRB which had denied the same relief.

In the instant case, the district court by means of a modified preliminary injunction issued before the NLRB's decision on the merits of the unfair labor practice complaint created a fund into which were paid the proceeds of the disputed contract provision. After the NLRB issued its decision in which it denied reimbursement of the monies collected pursuant to the disputed contract clause, the district court retained jurisdiction over the fund. In doing so, it ordered reimbursement of the funds collected under the challenged provision despite the fact that the NLRB had expressly declined to order such reimbursement. The effect of the district court's ruling was to award permanent affirmative relief to those who had

[7] Reproduced in pertinent part in Appendix H.

paid the royalties notwithstanding that the NLRB had denied the same relief which the district court awarded.

In 1947 Congress amended the Labor Management Relations Act to add Sections 10(j) and 10(*l*).[8] The purpose of these two sections was to provide for preliminary injunctive relief where such relief was necessary to avoid having the NLRB's remedial authority rendered meaningless pending a final NLRB decision on the merits. The Senate report which accompanied these 1947 amendments states in pertinent part:

> Time is usually of the essence in [unfair labor practice cases], and consequently the relatively slow procedure of Board hearing and order, followed many months later by an enforcing decree of the circuit court of appeals, falls short of achieving the desired objectives—the prompt elimination of the obstructions to the free flow of commerce and encouragement of the practice and procedure of free and private collective bargaining. Hence we have provided that the Board, acting in the public interest and not in vindication of purely private rights, may seek injunctive relief in the case of all types of unfair labor practices and that it shall also seek such relief in the case of strikes and boycotts defined as unfair labor practices. Senate Report No. 105 on S. 1126, 80th

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[8] The district court's authority to issue temporary injunctive relief is similar under Section 10(j) and Section 10(*l*). *NLRB v. Nash-Finch Company*, 404 U.S. 138, 142 (1971); *see Garner v. Teamsters*, 346 U.S. 485, 493 (1953). The difference between the two sections is that a Section 10(j) injunction may only be granted after the issuance of an unfair labor practice complaint but may restrain the commission of any unfair labor practice, whereas a Section 10(*l*) injunction may be sought prior to the issuance of the complaint but may restrain only certain specified unfair labor practices. In addition, under Section 10(*l*), the Regional Director of the NLRB must seek temporary injunctive relief if he has reasonable cause to believe one of the enumerated unfair labor practices has been committed, while under Section 10(j), the decision to seek temporary injunctive relief is discretionary with the Regional Director.

> Cong., 1st Sess. 8, *reprinted in* 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 433.

In *Amalgamated Clothing Workers v. Richman Brothers*, 348 U.S. 511, 516-517, this Court described the role of Sections 10(j) and 10(*l*) in the legislative scheme as follows:

> Congress has provided an administrative agency to pass on claims that rights granted by the Act are denied or that restrictions imposed by the Act are disregarded . . . [I]njunctive relief or a temporary restraining order may be obtained by the Board from the appropriate District Court, pending final adjudication by the Board . . . Congress explicitly gave such jurisdiction to the district courts only on behalf of the Board on a petition by it or "the officer or regional attorney to whom the matter may be referred." § 10(j), (*l*), 61 Stat 149, 29 USC § 160(j), (*l*). To hold that the Taft-Hartley Act also authorizes a private litigant to secure interim relief would be to ignore the closely circumscribed jurisdiction given to the District Court and to generalize where Congress has chosen to specify.

The courts can remain true to this legislative intent by issuing temporary relief under Sections 10(j) and 10(*l*) only in situations where the failure to grant such temporary relief will effectively nullify the efficacy of the NLRB's final order prior to its issuance. *NLRB v. Aerovox Corp. of Myrtle Beach*, 389 F.2d 475, 477 (4th Cir. 1967); *Minnesota Mining and Manufacturing Company v. Meter*, 385 F.2d 265, 270-271 (8th Cir. 1967); *Angle v. Sacks*, 382 F.2d 655, 660 (10th Cir. 1967). Since Sections 10(j) and 10(*l*) were only intended to provide temporary injunctive relief pending final adjudication by the NLRB, once the NLRB has reached a final resolution of the underlying unfair labor practice charge, the district court's authority to grant relief under Sections 10(j) and 10(*l*) terminates. *Sears, Roebuck & Co. v. Carpet,*

Linoleum, Soft Tile Layers, Local 419, 397 U.S. 655, 659, *reh'g denied*, 399 U.S. 917 (1970). Once the NLRB issues its final order, continued judicial relief may be obtained only in the court of appeals pursuant to Section 10(e) of the Act, 29 U.S.C. § 160(e),[9] which provides for enforcement of NLRB orders and interim injunctive relief pending appellate review. *Sears, Roebuck & Co.* v. *Carpet, Linoleum, Soft Tile Layers, Local 419, supra*, at 659. Thus, this Court has observed:

> Where the Board ultimately finds no unfair labor practice, it would clearly be contrary to the policies of the Act to permit a district court injunction to remain in effect pending Court of Appeals review of the District Court's action. And where the Board does find an unfair labor practice, § 10(e) provides an adequate remedy should its order be disobeyed. *Id.* at 658-59 (footnotes omitted).

Hence, the district court herein should have held the funds in its registry *solely* for the purpose of ensuring that those funds were available to be distributed in accordance with the mandate of the NLRB. Had the district court properly exercised its authority under Section 10(*l*), it would have distributed the moneys to the Trust Funds when the NLRB denied the General Counsel's reimbursement request.

Instead, the decisions of the courts below in this case wrongfully sanctioned an unwarranted intrusion into the NLRB's exclusive jurisdiction. Distribution of the funds held in the registry of the court to those who had paid the royalties amounts to an improper award of permanent relief by the district court in excess of its authority under Section 10(*l*). The district court justified the creation of the fund on the ground that it protected the interests of all the parties pending final resolution of the unfair labor practice charge by the NLRB. Yet, the effect of the

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[9] Reproduced in pertinent part in Appendix I.

creation of the fund was to establish jurisdiction *for the district court* to award affirmative relief after final resolution of the unfair labor practice charges by the NLRB which expressly denied such relief.

This intrusion into the exclusive jurisdiction of the NLRB cannot be justified as being necessary to protect the interests of private parties. The Act does not exist "to adjudicate private rights but to effectuate a public policy." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 192-193 (1941). Indeed, this Court has recognized that Sections 10(j) and 10(*l*) were enacted to authorize:

> [T]he Board, acting in the public interest *and not in vindication of purely private rights*, to seek injunctive relief in the case of all types of unfair labor practices . . . *Garner v. Teamsters*, *supra*, at 493 (emphasis added).

In short, this case presents a substantial federal question concerning the jurisdiction of the district courts to grant relief under Sections 10(j) and 10(*l*) of the Act. This Court granted a writ of certiorari to review a closely-related question in *McLeod v. General Electric Company*, 385 U.S. 533 (1967)[10] because the issue in that case had not previously been passed upon and was of continuing importance in the proper administration of the Act. *See McLeod v. General Electric Company*, 87 S.Ct. 5, 17 L.Ed.2d 45 (1966) (Justice Harlan in Chambers). The issue involved in *McLeod* concerned the standards to be applied by a district court pursuant to Section 10(j) in ordering an employer to bargain with a union pending the NLRB's decision on an unfair labor practice alleging that the employer had failed to bargain in good faith.

However, the Court never reached the underlying issue in *McLeod* because it determined that the case should

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[10] *McLeod* involved injunctive relief under Section 10(j). However, the standards for granting injunctive relief under Section 10(j) should be the same as the standards for granting injunctive relief under Section 10(*l*). See footnote 8, *supra*.

be remanded so that the district court could determine in the first instance the effect of intervening events upon the appropriateness of injunctive relief. *McLeod v. General Electric Company*, *supra*, 385 U.S., at 535. Indeed, in light of the Court's decision in *Sears, Roebuck & Company v. Carpet, Linoleum, Soft Tile Layers, Local 419*, *supra*, it is unlikely that many Section 10(j) or 10(*l*) cases will be presented for review in this Court since most, if not all, such cases will be rendered moot by intervening settlements or NLRB decisions on the merits of the underlying unfair labor practice cases. Thus, this case presents an appropriate vehicle for the Court to review a substantial question of continuing importance in the administration of the Act. Since the resolution of this question has been left open by *McLeod*, the Court should grant a writ of certiorari in this case.

A Writ Should Issue Since This Case Is Closely Related To A Case Presently Pending Before The Court

On May 17, 1982, the Court granted a writ of certiorari in *Shepard v. NLRB*, No. 81-1627, 50 U.S.L.W. 3908 (May 18, 1982). The question presented for review in that case concerned the standards employed by the NLRB in formulating "make whole" remedies in cases involving illegal voluntary "hot cargo" agreements.[11] The

[11] The petitioner stated the questions for review in *Shepard* as follows:

1. Whether the Court below erred in upholding the National Labor Relations Board's requirement that actual coercion must have been used to enforce a voluntary "hot cargo" agreement before a "make whole" remedy was appropriate for a violation of Section 8(e) of the Labor Management Relations Act.

2. Whether the Court below erred in enforcing the National Labor Relations Board's Order denying the petitioner a "make whole" remedy and allowing respondent labor union to retain petitioner's initiation fees, dues and fringe benefit contributions obtained through the enforcement of a "hot cargo" agreement prohibited by Section 8(e) of the Labor Management Relations Act.

identical question raised by *Shepard* was decided by the NLRB in adjudicating the unfair labor practice charges in the instant case. *General Longshoremen, ILA, Locals 1418 and 1419 (New Orleans Steamship Assn.), supra.*

Indeed, at the very heart of petitioners' claim herein is the contention that the rulings of the courts below in this case frustrate the NLRB's exclusive authority to formulate remedies in unfair labor practice cases and specifically in unfair labor practice cases involving voluntary "hot cargo" agreements which have been ruled unlawful under Section 8(e) of the Act.

There exists an obvious need for uniform administration of the Act and harmony between the remedial authority of the district courts under Section 10(*l*) and the NLRB's remedial authority under Section 10(c). Hence, a writ should issue herein so that this case may be considered simultaneously with *Shepard.*

CONCLUSION

For the reasons set forth above, petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81-3114

FALLON W. BENTZ, Acting Regional Director of the Fifteenth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Plaintiff-Appellee,

versus

GENERAL LONGSHORE WORKERS, ILA LOCAL NO. 1418 and GENERAL LONGSHORE WORKERS, ILA LOCAL NO. 1419,

Defendants-Appellants,

versus

GREAT SOUTHERN, *et al.*,

Intervenors-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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(March 29, 1982)

Before GOLDBERG, WILLIAMS and GARWOOD, Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 21.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 75-3223

Section "H"

FALLON W. BENTZ, Acting Regional Director of the Fifteenth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD

versus

GENERAL LONGSHORE WORKERS, ILA LOCAL No. 1418 and GENERAL LONGSHORE WORKERS, ILA LOCAL No. 1419

JUDGMENT

Considering the Reasons for Judgment issued this day and the compromise made with respect to attorneys' fees, it is Ordered, Adjudged, and Decreed that:

The Interlocutory Order Regarding Attorney Fees issued herein by this Court, dated and entered June 26, 1980, is hereby recalled and annulled.

The Clerk of Court is hereby directed not to disburse the funds in the Court's registry in this matter until all rights of appeal of this Judgment have expired or been exhausted, and all costs of Court and attorneys' fees have been taxed.

After the entry of this Judgment and the expiration of all delays for appeal or the final deposition of any appeal herefrom, then, following the next maturity date thereafter of the United States Treasury Bills in which the majority of the registry funds in this matter are invested, the Clerk of Court shall disburse the registry funds in the following manner and order:

1. From the interest portion of the said registry funds, the sum of $1,550.00 shall be deducted and paid, pursuant to this Court's order entered March 25, 1980, as follows:

(a) to Central Gulf Lines, Inc.	$516.67
(b) To Great Southern Paper Company and	516.67
(c) to International Navigation, Ltd.	516.66

to reimburse them for fees advanced to Arthur Anderson & Co. for financial evaluation of the NOSSA-ILA Escrow Account records;

2. From the interest portion of the said registry funds, the sum of $51.25 shall be deducted and paid to New Orleans Steamship Association as reimbursement for costs advanced for advertising a notice of the right to file claims herein in the Panama City, Florida *News-Herald* on June 20, 24, 27, and 28, 1979, as ordered by United States Magistrate James D. Carriere by order entered June 12, 1979;

3. The entire principal amount of the registry funds, and all interest earned thereon prior to deposit in the registry of the Court, shall be disbursed in accordance with and to the persons listed in Schedule I, II, and III of the Findings of Fact referred to in the said Reasons for Judgment;

4. The balance of the registry funds (*i.e.*, the remainder of the interest earned while in the Court's registry after deduction of the disbursements provided in paragraphs 1 and 2 hereinabove) shall be disbursed to the persons listed in Schedule IV of the above-referred-to Findings of Fact, in the proportions set forth in said Schedule IV;

provided that the disbursements ordered in paragraph 4 above may be modified pursuant to the Consent Judgment on Attorneys' Fees to be entered herein or, in the absence of such consent judgment, if the conditions to concurrence by the parties with the Consent Judgment are not met, the Court will then determine the amount and sources of attorneys' fees and costs to be awarded, and the disbursements ordered in paragraphs 3 and 4 above may be modified pursuant to such determination.

New Orleans, Louisiana, this 20th day of January, 1981.

/s/ A. G. Duplantier
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 75-3223

Section "H"

FALLON W. BENTZ, Acting Regional Director of the Fifteenth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD

versus

GENERAL LONGSHORE WORKERS, ILA LOCAL No. 1418 and GENERAL LONGSHORE WORKERS, ILA LOCAL No. 1419

REASONS FOR JUDGMENT

This matter originated as an injunction proceeding brought by the Regional Director of the National Labor Relations Board ("NLRB") under Sec. 10(*l*) of the National Labor Relations Act, as amended, 29 USC 160(1), to enjoin the collection of a royalty that was alleged to be unlawful. As is fully explained in this Court's Reasons for Judgment and Order signed April 5, 1979 and entered April 6, 1979 (which Reasons for Judgment and Order are incorporated herein by reference), the injunction proceedings eventually resulted in the deposit into the registry of the court, pending resolution by the NLRB of the question of legality of the royalty, of $1,095,119.82 of principal, plus interest accumulated both prior to and after deposit in the registry (hereinafter these monies shall be referred to as the "registry funds"). The NLRB eventually found the royalty to be unlawful. Proceedings were then renewed before this Court by various parties, intervenors, and claimants for attorneys' fees with respect to distribution of the registry funds.

After considering the oral arguments made in a conference by the Court with counsel for all parties and claimants for attorneys fees and intervenors, and all the various memoranda filed, this Court's said April 5, 1979 Order provided that the registry funds plus interest earned thereon would be paid to those persons who incurred the expense of the unlawful royalty, and referred this matter to United States Magistrate James D. Carriere to serve as a Special Master to determine who incurred this expense and the amount thereof as to each person, and reserved the attorneys' fees question in the event the parties were unable to resolve the same amicably.

By Special Master Finding and Recommendation signed March 27, 1980 and entered March 28, 1980, Magistrate Carriere made certain Findings of Fact and a Recommendation for Judgment. Timely objections and a motion for review were filed by two of the claimants for attorneys' fees. After full briefing and a status conference with counsel for all parties and claimants, the issues raised in the objections and motion for review and the awardability of attorneys' fees were determined by an interlocutory Order Regarding Attorney Fees signed and entered June 26, 1980.

Said Order Regarding Attorney Fees left for further determination the amount of any award of attorneys' fees to be made by the claimants thereof, Alley and Alley, Chartered, Sale, Bryant, Thompson & Kurvin, Chartered, and Panama City Port Authority (hereinafter, "the attorneys' fees claimants"). Several parties to this litigation, namely Great Southern Paper Company ("Great Southern"), Pioneer Shipping and Forwarding Company, Limited ("Pioneer"), International Navigation, Ltd. ("INL"), and Central Gulf Lines, Inc. ("Central Gulf") have made a compromise agreement with the attorneys' fees claimants, by means of which the amount of fees and out-of-pocket costs of the said attorneys'

fees claimants is fixed and the sources of payment of said fees and costs are agreed to. Said compromise agreement is conditioned upon several contingencies, the most important of which is the finality of the Judgment to be entered in accordance herewith. A copy of the compromise agreement is attached hereto as Exhibit A. If all of the conditions are met, the parties to the compromise agreement will submit for entry by the Court a Consent Judgment on Attorneys' Fees in the form of Exhibit B hereto. The court has reviewed and approved the same. Accordingly, the interlocutory Order Regarding Attorney Fees issued herein by this Court, dated and entered June 26, 1980, will be recalled and annulled. Because the parties in their compromise agreement have provided conditions to their concurrence with the Consent Judgment on Attorneys' Fees, which conditions relate to disposition of this matter including any appeal from the Judgment entered herewith, the Judgment entered this date will make no disposition with respect to the amount and source of attorneys' fees. If the conditions to concurrence with the Consent Judgment are not met and the Compromise Agreement is revoked, this Court will then fix the amount and sources of attorneys fees and costs.

The Court directs entry of a final judgment as to all of the claims herein except the the attorneys' fees claim, the Court determines that there is not just reason for delay and that the circumstances certainly justify the entrance of such a judgment (Rule 54(b)).

No objections having been made to the Magistrate's Findings of Fact Nos. 1 through 7, inclusive, the Court adopts said Findings of Fact with the exception that, in Finding of Fact No. 6, Schedule III, the figure "100.99%", a clerical error, is corrected to read "100.00"; it is also noted that, as a result of rounding off, the percentages shown in both the Finding of Fact No. 6, Schedule II and Finding of Fact No. 6, Schedule III actually total

100.01%; however, the monetary figures balance in both of said schedules.

Judgment will be entered accordingly.

/s/ A. G. Duplantier
United States District Judge

Entered: January 20, 1981

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action Number 75-3223

Section "H" (2)

FALLON W. BENTZ, ETC.

versus

GENERAL LONGSHORE WORKERS,
ILA LOCAL NO. 1418, *et al.*

SPECIAL MASTER FINDING AND RECOMMENDATION

Pursuant to the Order of Reference of the Honorable Adrian Duplantier, United States District Judge, this case was tried before the Honorable James D. Carriere, United States Magistrate, acting as a Special Master. Based on the evidence adduced at trial, there follows Findings of Fact and a Recommendation for Judgment.

STATEMENT OF THE CASE

This Civil Action was referred to this Magistrate to determine the entities which "incurred the expense of the unlawful royalty, the amount thereof, [and] the amount thereof as to each such person."

FINDINGS OF FACT

1. Written notice of the pendency of these proceedings and the necessity to file a claim against the funds in the registry of Court was given to the Panama City Port Authority and to the Southern Steamship Agency, Inc., Panama City, Florida. Published notice was given in the Panama City News Herald during the last two weeks of June, 1979. The deadline for filing such claims was October 1, 1979.

2. An audit was made by Arthur Andersen & Co. of the amounts paid into the New Orleans Steamship Association GAI Escrow Account and NOSSA-Royalty Escrow Account relating to loadings at Panama City, Florida and subsequently handled in the Port of New Orleans for the period from October 1, 1974 through May 31, 1978. The registry ledger of this Court was likewise audited and compared to the aforesaid accounts. Exhibit I.

3. This Court finds that $1,109,704.10 was paid into the registry of this Court. Of this, $6,533.44 represents interest earned by funds while in the hands of the New Orleans Steamship Association (NOSSA) prior to the payment of the funds into the Court's registry, $8,050.84 represents interest earned by funds while in the hands of the NOSSA-ILA Royalty Escrow Account (Escrow Account) prior to the payment of the funds into the Court's registry, and the balance, $1,095,119.82, represents principal paid in.

4. The principal paid in is attributable and should be disbursed to the claimants as follows.

SCHEDULE 1

NOSSA	$ 22,397.94*
Escrow Account	22,397.94*
Lykes Bros. Steamship Co., Inc. (Lykes)	81,156.00
Central Gulf Lines, Inc. (Central Gulf)	247,243.06
Combi Line (Combi)	78,233.40
Waterman Steamship Corporation (Waterman)	4,935.30
Pioneer Shipping and Forwarding Company, Limited (Pioneer)	79,516.00
Great Southern Paper Company (Great Southern)	226,510.00
International Navigation, Ltd. (I.N.L.)	332,730.16
TOTAL	$1,095,119.80**

* The sums claimed by NOSSA and the Escrow Account represent monies paid into the Court's registry in error.

** A two cent ($.02) differential cannot be accounted for.

5. The $6,533.44 of interest paid in to the Court's registry by NOSSA should be prorated and distributed to those who paid in the monies as follows.

SCHEDULE II

Lykes	7.73%	$ 464.17
Central Gulf	23.54	1,413.48
Combi	7.45	447.26
Waterman	0.47	28.21
Pioneer	7.57	454.56
Great Southern	21.57	1,294.99
I.N.L.	31.68	1,902.27
	100.00%	$6,004.94
NOSSA	——	$ 529.50
Escrow Account	——	-0-
TOTAL		$6,533.44

6. The $8,050.84 of interest paid in to the Court's registry by the Escrow Account should be prorated and distributed to those who paid in the monies, as follows.

SCHEDULE III

Lykes	7.73%	$ 567.53
Central Gulf	23.54	1,728.20
Combi	7.45	547.02
Waterman	0.47	34.51
Pioneer	7.57	555.79
Great Southern	21.57	1,583.59
I.N.L.	31.68	2,325.85
	100.99%	$7,342.49
NOSSA	——	-0-
Escrow Account	——	$ 708.35
TOTAL		$8,050.84

7. All interest earned by the funds while on deposit in the registry of the Court and until such time as the funds are disbursed to the claimants should be prorated among and disbursed to those who bore the expense of the monies paid in, dividing their respective portions to the principal, as shown by Schedule 1 above, by $1,095,120.00

(the total principal, rounded to the nearest dollar), as follows.

SCHEDULE IV

NOSSA	2.05%
Escrow Account	2.05
Lykes	7.41
Central Gulf	22.58
Combi	7.14
Waterman	0.45
Pioneer	7.26
Great Southern	20.68
I.N.I.	30.38
TOTAL	100.00%

8. The parties hereto all agree to the correctness of the foregoing Schedules, but also recognize and agree that the amount to be distributed to the respective claimants are subject to the Court's decision regarding the remaining legal issues, including, without limitation, such reductions to claims, if any, as the Court may decree in order to provide for reimbursement of costs advanced to the persons so advancing costs and for such costs and attorney's fees, if any, as the Court may award to Alley and Alley, Chartered, to Sale, Bryant, Thompson and Kurvin, Chartered, and/or to Panama City Port Authority.

RECOMMENDATION

It is recommended that the Court adopt the Schedule of Distribution contained herein after a determination of the remaining legal issues in this litigation.

New Orleans, Louisiana, March 27, 1980.

/s/ _____

JAMES D. CARRIERE
United States Magistrate

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 75-3223

Section "H"

FALLON W. BENTZ, ETC.

vs.

GENERAL LONGSHORE WORKERS,
ILA LOCAL NO. 1418, *et al.*

REASONS FOR JUDGMENT

This proceeding was instituted by the Regional Director of the NLRB under the authority of Title 29, United States Code, Section 160(1) seeking injunctive relief against an alleged unfair labor practice. The particular practice complained of was a provision in a collective bargaining agreement between ILA Locals 1418 and 1419 (Unions) and New Orleans Steamship Association (NOSSA). That provision, referred to as the "lighter royalty provision," is as follows:

> "(1) Lighter Royalty
>
> 1. On LASH and/or SEABEE lighters into or from which cargo has been loaded or discharged in United States ports by other than ILA labor and after which said lighters are loaded or discharged to or from the LASH system ship and/or SEABEE type ship by ILA longshore labor within the Port Limits herein defined, the employer shall pay to the Administrator of the NOSSA-ILA Pension, Welfare, Vacation and Holiday Funds the sum of One Dollar ($1.00) per long ton of cargo which was loaded or

discharged into or out of said lighters by non-ILA labor, subject to the following conditions:

a. No royalty payments shall be made on any such cargo if it was rehandled by ILA longshore labor at the request of the employer before putting it aboard ship;

b. No royalty payments shall be paid on any lighters that have been loaded with cargo not subject to load or count, such as dry bulk fertilizers, grain, bulk lube oil, bulk chemicals, et cetera.

Any such royalty monies actually paid to the Administrator of said Funds on or after the effective date of this contract (whether or not previously accrued) shall be divided as provided in accord with the Article hereof entitled "Royalties".

2. For each dollar paid by the employer to the NOSSA-ILA Pension Fund in accord with Section (1) above, the employer shall pay an equal amount to the Association for deposit in a "Guaranteed Annual Income" Escrow Account which shall be used by the Association in accord with and solely for the purposes set out in Section 12 of Article XXVIII-Guaranteed Annual Income."

On March 15, 1976, Judge West enjoined the enforcement of this provision as applied to ships emanating from the port of Panama City, Florida which pass through the port of New Orleans. In addition, Judge West ordered the parties to submit an order providing a method to keep account of the tonnage of LASH and SEABEE barge traffic emanating from Panama City and passing through New Orleans, so that payments due under the disputed agreement could be computed in the event that the agreement was ultimately determined to be lawful.

In response, the NLRB submitted a proposed order. Both the unions and NOSSA objected to this procedure and argued instead that rather than enjoin the enforcement of the royalty provision, the court should order the payments deposited in the registry of the court. NOSSA's motion filed April 23, 1976, included the following argument:

> Conversely, the continuance of royalty payments during the pendency of this litigation, conditioned upon an escrow of the royalty sums in the Registry of Court or as otherwise directed by this Court, would result in no injury to the charging parties since the sums of money paid monthly would all be available to those charging parties at the end of this litigation should the result be favorable to the NLRB.

The Unions put forth the same argument in different language in their supporting memorandum:

> In order to protect the interest of the employees for whose benefit the royalty is collected, it is necessary to put the money royalty on the side. In the event the Unions prevail the money would be immediately available for distribution in accordance with the Collective Bargaining Agreement. If the Unions do not prevail, the money can be returned with interest to those who have paid it. Everyone is protected and there can be no chance of injustice.

Thereafter, on June 28, 1976, Judge West modified the March 15th order and ordered that the funds be deposited in the registry of the court pending final determination of the matter by the National Labor Relations Board. A total of approximately $1.1 million was deposited in the court registry; the proper distribution of that sum is the issue now.

On March 17, 1978, the NLRB, adopting the ruling of Administrative Law Judge Arthur Leff, decided that

the lighter royalty provision was in violation of Section 8(e) of the National Labor Relations Act, 29 U.S.C. Section 158(e), and ordered that the Unions cease giving it effect.

Following the Board's decision, the NLRB moved to dissolve the injunction and terminate the proceeding in this court. Great Southern Paper Co., International Navigation, Ltd. and Central Gulf Lines, Inc. intervened on the issue of the proper distribution of the registry funds. Panama City Port Authority, the Charging Party in the NLRB proceeding, and its attorneys intervened for attorney's fees and costs incurred. All of the parties have had the opportunity to state their positions with regard to the disbursement of the funds.

All parties agree that the temporary injunction should be vacated and dissolved, since the judgment that the contested contract provision is unlawful is definitive. Not surprisingly, the parties disagree about what should be done with the money in the court registry.

The Unions and NOSSA argue that the funds should be returned to the NOSSA-ILA Pension Fund as called for by the collective bargaining agreement. Such a result would, in the opinion of this Court, defeat the purpose of Judge West's order that the funds be deposited in the court's registry. As indicated above, that order was in response to urgings of NOSSA and the Unions. It was an exercise of the court's equitable powers to protect the interests of all parties, pending the Board's adjudication. And, as can be seen from the quoted portions of the briefs of NOSSA and the Unions, those parties asserted that in the event the Board found the royalty unlawful, the funds should be returned to those who paid them. Equity demands nothing less.

It is contended that the Board had the issue of "reimbursement" before it and decided not to grant such relief. That contention is based on a footnote in Adminis-

trative Law Judge Leff's opinion. Whatever might be the result if the Administrative Law Judge's footnote concerning "reimbursement" were construed in any other way, the court does not construe it as applicable to the funds deposited in the registry of the court and thus gives it no effect with respect to the issues now before the court.

The funds are ordered returned to those who incurred the unlawful expense. The determination of the person who incurred the expense of the unlawful royalty and to what amount is not as simple as might first appear. While the record is not entirely clear with respect to the following, apparently all of the funds at issue were paid into the registry of court by stevedoring companies. In some instances, the stevedore did not add the royalty to its bill to the shipping company for its services but instead elected to absorb it. Those royalties should be returned to the stevedoring companies. In other instances, the stevedore included the unlawful royalty charge in its bill to the shipping company. In some of these instances, the shipping company absorbed the charge and is entitled to the reimbursement; in others it was billed to the shipper either as a specific billing item or as part of the carrier-shipping company's tariff. In this last situation, the shipper is entitled to reimbursement.

The case will be referred to a Magistrate for further proceedings to determine who should receive the funds and in what amount. The issue with respect to attorney fees is deferred; perhaps in the course of the proceedings before the Magistrate it can be resolved amicably.[1] If not, the court will pass upon it after the conclusion of the proceedings before the Magistrate.

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[1] Without deciding that any fees or expenses are due, the court notes that some of the registry funds may remain unclaimed at the conclusion of the proceedings and thus may be available for payment of such fees and expenses if they are determined to be due.

ORDER

For the foregoing reasons, the following is hereby ordered:

(1) The temporary injunction entered herein on March 15, 1976 (as modified June 28, 1976) is vacated and dissolved;

(2) The funds, plus interest earned thereon, deposited in the registry of the court in accordance with the order of June 28, 1976 shall be paid to those persons who incurred the expense of the unlawful royalty.

(3) This matter is referred to a United States Magistrate, who shall serve as a Special Master, as provided by Rule 53 FRCP, to conduct further proceedings with respect to the determination of the persons who incurred the expense of the unlawful royalty, the amount thereof as to each such person, and to file a report and recommendation with respect thereto.

The Magistrate shall fashion an appropriate procedure to carry out this order, including procedures for notice to potential claimants.

(4) A determination by the court with respect to the claim by Panama City Port Authority and its attorneys, Alley and Alley, for attorney's fees is deferred until such time as the proceedings before the Magistrate are concluded.

New Orleans, La., April 5, 1979

/s/ A. G. Duplantier
U.S. District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 75-3223

Section "H"

FALLON W. BENTZ, Acting Regional Director of the Fifteenth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD

versus

GENERAL LONGSHORE WORKERS, ILA LOCAL No. 1418 and GENERAL LONGSHORE WORKERS, ILA LOCAL No. 1419

ORDER

On March 15, 1976, an order, enjoining the New Orleans Steamship Association (hereafter NOSSA) and ILA locals 1418 and 1419 from enforcing the royalty provision which was at issue in this matter, was entered. This order directed the parties to the litigation to meet and prepare "an order providing for a method to keep account of the tonnage of LASH and SEEBEE Barges emanating from the Port of Panama City, which passes through the port of New Orleans from this date, pending final adjudications by the Board with respect to this matter."

Almost simultaneously, the United States District Court for the Southern District of Alabama, Southern Division, Judge W. B. Hand presiding, enjoined the enforcement of a similar royalty provision, pursuant to § 10(1) of the National Labor Relations Act, as amended.[1]

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[1] *Fallon W. Bentz v. International Longshoremen's Association*, Local 1410 (Longshore Division), C.A. No. 75-507-H, (Ala. S.D., 1976).

When faced with the problem which is now before the Court, Judge Hand held:

> "The Court, upon consideration of the pleadings, evidence, argument of counsel and the entire record in the case, as well as having inquired of the parties as to their opposition in the premises, has determined that the most appropriate vehicle to maintain status quo of the questioned funds is to have said funds paid into the Registry of the Court."

Although such an order unquestionably mitigates the injunctive relief afforded petitioner by order dated March 15, 1976, it does indeed appear to be the most equitable means to maintain the status quo pending final determination by the Board. Furthermore, the interest of judicial consistency would be best served by the adoption of a similar order.

Therefore, IT IS HEREBY ORDERED that the funds collected by the respondents be deposited in the registry of the Court pending final determination of this matter by the Board.

New Orleans, Louisiana, this 28th day of June, 1976.

/s/ R. Blake West
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 75-3223

Section "H"

FALLON W. BENTZ, Acting Regional Director of the Fifteenth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD

versus

GENERAL LONGSHORE WORKERS, ILA LOCAL No. 1418 and GENERAL LONGSHORE WORKERS, ILA LOCAL No. 1419

MEMORANDUM AND ORDER

The Court has jurisdiction over this matter pursuant to Section 10(1) of Labor Management Relations Act, 1947, as amended by Public Law 86-257, 1959.[1]

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[1] "(1) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding

The only question before the Court is whether injunctive relief should be granted pending final adjudication of the provision of the agreement which is in controversy by the Board.

The test the Court must use in determining this question is whether petitioner has established the likelihood of a violation or a prima facie case of a violation. *Douds v. Milk Drivers*, 248 F.2d 534 (C.2, 1957); *Brown v. National Union of Marine Cooks and Stewards*, 104 F.Supp. 685 (N.D.Calif., 1951).

The petitioner need not show that an unfair labor practice has been committed, but need only demonstrate that there is reasonable cause to believe that the elements of an unfair labor practice are present. *Boire v. International Brotherhood of Teamsters*, 479 F.2d 778, (C.5, 1973).

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any other provision of law; *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further*, That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, that for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organizations a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D)."

I. THE FACTS

The facts are as follows:

On or about October 1, 1974, ILA Locals No. 1418 and 1419 (hereafter Respondents) entered into a collective bargaining agreement with the New Orleans Steamship Association (hereafter NOSSA), governing the payment of wages, rates of pay, working conditions, and other related matters in connection with longshore work performed in and around the Port of New Orleans by employees of employer-members of (and/or employers represented by) NOSSA. The agreement contains the following special provision applicable to LASH system ships and SEABEE type ships:

> "(1) Lighter Royalty
>
> 1. On LASH and/or SEABEE lighters into or from which cargo has been loaded or discharged in United States ports by other than ILA labor and after which said lighters are loaded or discharged to or from the LASH system ship and/or SEABEE type ship by ILA longshore labor within the Port Limits herein defined, the employer shall pay to the Administrator of the NOSSA-ILA Pension, Welfare, Vacation and Holiday Funds the sum of One Dollar ($1.00) per long ton of cargo which was loaded or discharged into or out of said lighters by non-ILA labor, subject to the following conditions:
>
> a. No royalty payments shall be made on any such cargo if it was rehandled by ILA longshore labor at the request of the employer before putting it aboard ship;
>
> b. No royalty payments shall be paid on any lighters that have been loaded with cargo not subject to load or count, such as dry bulk fertilizers, grain, bulk lube oil, bulk chemicals, et cetera.

Any such royalty monies actually paid to the Administrator of said Funds on or after the effective date of this contract (whether or not previously accrued) shall be divided as provided in accord with the Article hereof entitled "Royalties".

2. For each dollar paid by the employer to the NOSSA-ILA Pension Fund in accord with Section (1) above, the employer shall pay an equal amount to the Association for deposit in a "Guaranteed Annual Income" Escrow Account which shall be used by the Association in accord with and solely for the purposes set out in Section 12 of Article XXVIII-Guaranteed Annual Income."

From October 1, 1974, and continuing to date, Respondents and NOSSA, its employer-members and employers represented by NOSSA, have maintained, reaffirmed, given full force and effect to, enforced and/or sought to enforce Article XXVI and Article XXVII, Section (1) (hereafter lighter royalty) of their collective bargaining agreement. By virtue of the lighter royalty clause in the ILA-NOSSA collective-bargaining agreement all cargo loaded into LASH and/or SEABEE lighters (barges) in the Port of Panama City (a non-ILA labor port) and thereafter loaded (in lighter form) upon system ships in the Port of New Orleans has, at all times since on or about October 1, 1974, and continuing to date, been assessed (taxed) a royalty payment (penalty) amounting to $2.00 per long ton. During the period since October 1, 1974, a total in excess of 100,000 long tons of cargo emanating from the Panama City Port has been subjected to financial penalties totaling in excess of $200,000. Of the traditional users of the Panama City Port whose cargo has been subjected to the lighter royalty by virtue of the "non-ILA" status of longshoremen employed by the Panama City stevedores, Great Southern Paper Company of Cedar Springs, Georgia has accounted for approximately 67,275 long tons of lighter cargo amounting to approximately $134,550.

II. THE LAW

Section 8(e) of the National Labor Relations Act was adopted in order to prohibit labor organizations from accomplishment by agreement what they could not otherwise accomplish.[2]

Therefore, if the lighter royalty provisions constitute a prohibited secondary boycott, they are *per se* unlawful.[3]

III. CONCLUSION

After a careful review of the entire record, the Court finds that there is no doubt but that the petitioner has

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[2] *Local 1976, United Brotherhood of Carpenters v. Labor Board (Sand Door)*, 357 U.S. 93, 78 S.Ct. 1011, 2 L.Ed.2d 1186. (1958).

[3] As stated by the Board in *Dan McKinney Co.*, 137 NLRB 649, at 655,

> ". . . It is clear from the legislative history that, to close these loopholes, Congress, in banning the signing of all such agreements, intended also to render unlawful a secondary boycott resulting from the employer's voluntary compliance with an existing hot-cargo clause and to render the employer's consent ineffective for all purposes. The congressional intent to interdict an actual cessation of business pursuant to an illegal clause is further obvious from a literal reading of Section 8(e) itself, which prohibits such agreement 'whereby such employer ceases or refrains . . . from . . . doing business with any other person . . .' Also, it is clear that Congress was of the opinion that the mere existence of such provisions has coercive effect upon an employer and, in providing that hot cargo clauses shall be 'void and unenforcible', was legislating to eradicate any form, existence, or enforcement of such contracts as against public policy. Accordingly, to accomplish its purpose, Congress broadened the Board's power to include the authority which it did not previously have according to the Supreme Court's decision in *Sand Door*, and commissioned the Board, where proper charges are filed, to police collective-bargaining agreements insofar as hot cargo clauses are concerned and to make findings of unfair labor practices where the facts reveal that any such agreement has been initiated or there has been any enforcement of such a clause.

made a prima facie showing of a violation of the National Labor Relations Act.

As further discussed below the Respondents and NOSSA were unable to defend the lighter royalty on either work preservation or union standards consideration:

A. *Work preservation*

The respondents and NOSSA argue that the lighter royalty serves to preserve work which has traditionally been done by ILA Locals 1418 and 1419, in that, had the barges not been "stuffed" in Panama City, the cargo would have been loaded break bulk in New Orleans, or "stuffed" in other ILA ports.[4]

Such a contention is without support, when one considers the fact that the work being performed by the ALA members is without the geographical work jurisdiction of the Respondents' principal work unit (the Port of New Orleans).

Furthermore, it is clear that the Port of Panama City has historically used ALA labor to load their products into the holds of both ocean-going vessels and lighters.[5] Obviously, therefore, ILA Locals 1418 and 1419 have not traditionally done the same work.

B. *Union Standards*

A comparison of Respondents' collective bargaining agreement[6] with that of Panama City[7] reveals that the wages during the same period of time are identical.

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[4] Testimony of Mr. Alfred Chittenden, President of ILA Local 1418.

[5] See Petitioner's Exhibits 6, 9, and 10.

[6] See Petiitoner's Exhibit 2, Appendix A.

[7] Petitioner's Exhibit 3—Rule No. 40.

In fact, the ALA contract requires increases in wages and fringe benefits contributions equal to those in other Gulf of Mexico ports (including the port of New Orleans).

Furthermore, as there is no evidence that the Respondents knew or made any effort to discover whether the wages or fringe benefits paid longshoremen in Panama City were comparable to the standard in the New Orleans area, the Panama City port area is without the jurisdiction of ILA Locals 1418 and 1419.

Regardless of the fact that the port of Panama City enjoys a competitive advantage over ILA ports because of favorable inland rail rates, or the fact that the lighter royalty may be absorbed by the members of NOSSA, or passed on to the shippers and users of the Panama City port, the fact remains that the lighter royalty appears to have a disruptive effect upon the business relationship between a neutral employer (Great Southern Paper Company) and the primary employer (The Panama City Port Authority). Such a disruptive effect has been held sufficient to meet the "cease doing business" requirements of Section 8(b)(4)(A) and (B) and 8(e) of the Act.[8] That is to say, if Great Southern Paper Company shipped from an ILA port, instead of the Panama City port, the cargo which passed through the Port of New Orleans would not be subject to the lighter royalty. Obviously, the imposition of such a lighter royalty unfairly handicaps the Port of Panama City.

IT IS THEREFORE ORDERED that the defendants, General Longshore Workers, ILA, Local No. 1418 and Local No. 1419, be, and the same are hereby, enjoined from enforcing Articles XXVI and XXVII of the collective bargaining agreement existing between the defendants and the New Orleans Steamship Association.

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[8] N.L.R.B. v. Local 825, Operating Engineers (Burns and Roe, Inc.), 76 L.R.R.M. 2129.

This order effects, however, only LASH and SEABEE barges emanating from the port of Panama City, Florida, which pass through the port of New Orleans,

IT IS FURTHER ORDERED that the defendants, the intervenor, and the petitioner submit to the Court an order providing a method to keep account of the tonnage of LASH and SEEBEE barge traffic emanating from the port of Panama City which passes through the port of New Orleans, from this date, pending final adjudication by the Board with respect to this matter.

New Orleans, Louisiana, this 15th day of March, 1976.

/s/ R. Blake West
United States District Judge

APPENDIX H

Section 10(c) of the Labor Management Relations Act, 1947, 29 U.S.C. § 160(c) (in pertinent part):

> . . . If upon a preponderance of the testimony taken the Board shall be of the opinion that any persons named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this subchapter . . .

APPENDIX I

Section 10(e) of the Labor Management Relations Act, 1947, 29 U.S.C. § 160(e) (in pertinent part):

> The Board shall have power to petition any Court of Appeals of the United States . . . for the enforcement of [its] order and for appropriate temporary relief or restraining order . . . Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the questions determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or part the order of the Board.

No. 81-2384

Office - Supreme Court, U.S.
FILED
SEP 30 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

GENERAL LONGSHORE WORKERS, ILA, LOCALS 1418 AND 1419, PETITIONERS

v.

FALLON W. BENTZ, ACTING REGIONAL DIRECTOR OF THE FIFTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court, having ordered that certain royalty payments required under a collective bargaining agreement between the union and a shipping association be deposited into the registry of the court pending a determination by the National Labor Relations Board as to the legality of the royalty provisions, abused its discretion by returning the deposited monies to the employers who had paid them, upon the Board's determination that the royalty provisions violated Section 8(e) of the National Labor Relations Act.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a) is unreported. The orders of the district court (Pet. App. 2a-28a) are unreported. The Decision and Order of the National Labor Relations Board are reported at 235 N.L.R.B. 161.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1982 (Pet. App. 1a). The petition for a writ of certiorari was filed on Monday, June 28, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provision of the National Labor Relations Act, Section 10(*l*), 29 U.S.C. 160(*l*), is set forth at Pet. 2.

STATEMENT

1. The Panama City Port Authority filed unfair labor practice charges with the National Labor Relations Board ("NLRB") alleging that certain royalty provisions[1] in petitioners' 1974 to 1977 collective bargaining agreement with New Orleans Steamship Association ("NOSSA"), violated Sections 8(b)(4)(A) and (B) and 8(e), the "secondary boycott" and "hot cargo" provisions, of the National Labor Relations Act (the "Act"), 29 U.S.C. 158(b)(4)(A) and (B) and 158(e). Upon finding reasonable cause to believe that the charges were true, the Board's Acting Regional Director for the Fifteenth Region petitioned the district court for preliminary injunctive relief under Section 10(*l*) of the Act, 29 U.S.C. 160(*l*). The district court, agreeing that there was "reasonable cause" to believe that petitioners were in violation of the Act, entered an order enjoining petitioners from enforcing the disputed royalty provisions (Pet. App. 27a). The district court subsequently modified its original injunction by permitting the royalties to be collected, subject to their being deposited into the registry of the court "pending final determination of this matter by the Board" (Pet. App. 20a). This modification was made in response to the contention by petitioners and NOSSA that, absent actual collection of the royalties, their ability to recover the funds in the event that the Board found the contested contractual provisions to be lawful could not adequately be preserved. They also represented that, "[i]f [petitioners] do not prevail [before the Board], the money can be returned with interest to those who have paid it," and that "the sums of money paid monthly would all be available to [the payors] at the

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[1]The provisions are set out at Pet. App. 23a-24a.

end of this litigation should the result be favorable to the NLRB" (Pet. App. 15a).

2. Following the injunction proceedings, the parties litigated before the Board the legality of the royalty provisions. The Board's Administrative Law Judge ("ALJ") concluded that petitioners, by maintaining and giving effect to the royalty provisions, violated Section 8(e) of the Act, and recommended that petitioners be ordered to cease and desist from maintaining, giving effect to, enforcing, or reaffirming the contested royalty provisions to the extent found unlawful. *General Longshore Workers, ILA Local No. 1418*, 235 N.L.R.B. 161, 170 (1978). The ALJ, however, rejected a further remedy sought by the General Counsel, namely, that petitioners be ordered to reimburse the payors of the royalties for the amounts that had been paid pursuant to the unlawful contractual provisions. The ALJ held that such a remedy was inappropriate since "the royalties paid by these employers were not involuntarily exacted from them by unlawful means but were sanctioned by the contract to which they voluntarily agreed." *Id.* at 170 n.23. The Board adopted the ALJ's decision and his recommended order. *Id.* at 161.

3. Following issuance of the Board's order, further proceedings were held in the district court to distribute the escrowed royalty payments. By order of April 5, 1979 (Pet. App. 18a), the district court vacated the Section 10(*l*) injunction as subsequently modified, ordered that the escrowed funds be paid "to those persons who incurred the expense of the unlawful royalty," and referred the matter to a Magistrate acting as a Special Master, pursuant to Rule 53, Fed. R. Civ. P., to determine "the persons who incurred the expense of the unlawful royalty, the amount thereof as to each such person, and to file a report and recommendation with respect thereto." The district court rejected the contention, made by petitioners and NOSSA, that the

funds should be paid to the NOSSA-ILA pension fund as called for by the collective bargaining agreement. In this regard, the court explained that the escrow account had been established as "an exercise of the court's equitable powers to protect the interests of all parties, pending the Board's adjudication" and that distribution of the deposited amounts to the pension fund would "defeat the purpose of [the escrow] order" (Pet. App. 16a). The court also noted that petitioners and NOSSA, in seeking an escrow arrangement in lieu of an outright ban on collection of the payments, had "asserted that in the event the Board found the royalty unlawful, the funds should be returned to those who paid them" (*ibid.*). Finally, the district court rejected the contention that the NLRB had before it the issue of reimbursement of the registry funds and had decided not to grant such relief, stating that "the court does not construe [the ALJ's ruling concerning reimbursement] as applicable to the funds deposited in the registry of the court" (Pet. App. 17a).

Following additional proceedings before the Special Master, the district court adopted the Special Master's proposed schedule of distribution and entered judgment accordingly (Pet. App. 2a-8a, 9a-12a).[2] The court of appeals affirmed (Pet. App. 1a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. The issue presented involves a matter entrusted to the broad discretion of the district court and presents no occasion for further review by this Court.

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[2]The judgment provided for the distribution of a principal sum of $1,095,119.80, plus accumulated interest of $14,584.28 (Pet. App. 10a-11a).

1. Section 10(*l*) of the Act embodies the congressional determination that certain unfair labor practices, principally secondary boycotts and "hot cargo" agreements, engender such serious interruptions of commerce that they should be discontinued pending final adjudication by the Board in order to avoid irreparable injury to the policies of the Act. S. Rep. No. 105, 80th Cong., 1st Sess. 8, 27 (1947); *Union De Tronquistas De Puerto Rico* v. *Arlook*, 586 F. 2d 872, 876 (1st Cir. 1978); *Squillacote* v. *International Brotherhood of Teamsters*, 561 F. 2d 31, 35 (7th Cir. 1977); *Wilson* v. *Milk Drivers & Dairy Employees Union, Local 471*, 491 F. 2d 200, 203 (8th Cir. 1974). Therefore, in that section, Congress imposed upon the Board's Regional Directors a duty to seek injunctive relief in the appropriate district court upon a reasonable belief that a violation has occurred, and empowered the court to grant such injunctive relief as it deems "just and proper." In framing such relief, the court retains a measure of equitable discretion, *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944), and its actions may be reversed only upon a showing of abuse of discretion. *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931-932 (1975); *Brown* v. *Chote*, 411 U.S. 452, 457 (1973).

Petitioners contend that the district court exceeded its authority under Section 10(*l*) by awarding "affirmative monetary relief following a final decision on the underlying unfair labor practice by the NLRB which had denied the same relief" (Pet. 6). According to petitioners, since Section 10(*l*) was "only intended to provide temporary injunctive relief pending final adjudication by the NLRB," the district court "should have held the funds in its registry *solely* for the purpose of ensuring that those funds were available to be distributed in accordance with the mandate of the NLRB" (Pet. 8-9; emphasis in original). There is no merit to this contention.

It is undisputed that the district court, having found reasonable cause to believe that the royalty provisions violated Section 8(e) of the Act, had the power under Section 10(*l*) to enjoin, as it did initially, collection of the royalty payments outright pending a final Board determination of the legality of those provisions. In that event, upon issuance of the Board's decision finding that the royalty provisions violated Section 8(e), petitioners would not have been entitled to collect royalty payments from the employers for the period prior to the Board's decision. Section 8(e) provides that agreements proscribed by that section shall be "unenforceable and void." See *Kaiser Steel Corp.* v. *Mullins*, No. 80-1345 (Jan. 13, 1982), slip op. 10-13.

Petitioners should be in no better position merely because the district court, at their urging, modified its initial decision and instead provided that the royalties be paid into the court's registry pending the Board's determination. Thus, following the Board's decision that the royalty provisions were unlawful, the district court reasonably exercised the equitable discretion it possesses under Section 10(*l*) in deciding that the escrowed royalties should revert, not to the NOSSA-ILA pension fund, but to the persons who paid them. The district court thereby merely placed the parties in the same position that they would have been in had the collections initially been enjoined outright.[3] Indeed, had

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[3]Petitioners contend (Pet. 5 n.6) that, under the terms of the escrow agreement, the monies were to be returned to the payors only "if the Unions did not 'prevail' before the NLRB," and "the Unions did 'prevail' at the NLRB on the crucial issue of reimbursement." It is clear, however, that the district court, and indeed the parties, meant prevailing before the Board on the question whether the royalty provisions violated Section 8(e) of the Act, and petitioners did not win on that issue.

Nor is there merit to petitioners' contention (Pet. 9-10) that the district court's distribution of the escrowed funds to those who had paid them intruded upon the Board's exclusive jurisdiction. As the district

the court directed that the escrowed funds be paid to the pension fund it would have been enforcing and giving effect to the unlawful contractual provisions, in direct contravention of the Board's mandate.

2. Contrary to petitioners' contention (Pet. 11-12), this case is not closely related to *Shepard* v. *NLRB*, cert. granted, No. 81-1627 (May 17, 1982). The issue in *Shepard* is whether the Board properly exercised its Section 10(c), 29 U.S.C. 160(c), remedial authority in declining to grant a "make whole" remedy in the case of a Section 8(e) violation unaccompanied by restraint or coercion. The instant case does not involve the Board's remedial authority, but, rather, the propriety of the exercise of the district court's authority under Section 10(*l*) to grant such injunctive relief as is "just and proper."

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court correctly concluded (*supra*, page 4), the ALJ, in deciding not to order reimbursement of monies paid under the unlawful royalty provisions, was not purporting to determine what disposition should be made of funds which, pursuant to the court's order, had meanwhile been deposited in the court's registry. Moreover, the fact that the district court's power to continue a 10(*l*) injunction ended when the Board's decision issued does not mean that the court did not possess residual power to dispose of matters which remained from its prior exercise of jurisdiction. Just as the district court would have power to dissolve a previously issued 10(*l*) injunction, it would have power to decide what disposition should be made of an escrow fund ordered in lieu of an injunction.

Finally, contrary to petitioner's contention (Pet. 10-11), no issue concerning the proper standards for granting injunctive relief under Sections 10(j) and (*l*) of the Act, 29 U.S.C. 160(j) and (*l*) is presented here (cf. *McLeod* v. *General Electric Co.*, 385 U.S. 533 (1967)). As shown (*supra*, pages 5-6), the issuance of a 10(*l*) injunction was clearly appropriate here; the only question is whether the district court abused its equitable discretion in disposing of an escrow fund that was ordered in lieu of an injunction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1982

DOJ-1982-09

Office - Supreme Court, U.S.
FILED
AUG 28 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-2384

In The Supreme Court of the United States

OCTOBER TERM, 1981

GENERAL LONGSHORE WORKERS, ILA LOCALS 1418 and 1419

Petitioners

v.

FALLON W. BENTZ, Acting Regional Director of the Fifteenth Region of the National Labor Relations Board,

Respondent

and

Great Southern, et al.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Did the district court abuse its discretion when it ordered the distribution of royalty payments, paid into the court's registry pursuant to an order that modified an earlier temporary injunction order obtained under Section 10(*l*) of the Labor Management Relations Act pending the NLRB's determination that the royalties were violative of the Act, to those parties who bore this expense of the illegal payments?

PARTIES TO THE PROCEEDINGS BELOW

Fallon W. Bentz, Acting Regional Director, Region 15, National Labor Relations Board (Plaintiff in district court)

General Longshore Workers, ILA, Locals 1418 and 1419 (now merged—Local 3000) (Defendants in district court)

* * *

New Orleans Steamship Association (Intervenor in injunction proceedings, aligned with defendants)

***

Panama City Port Authority Great Southern Paper Company International Navigation, Ltd. Central Gulf Lines, Inc. Alley & Alley, Chartered	(formal Intervenors into fund distribution proceedings to assert claims to portions of funds in court registry)

* * *

Sale, Bryant, Thompson & Kurvin Pioneer Shipping and Forward Company, Limited NOSSA-ILA Royalty Escrow Account Lykes Bros. Steamship Co., Inc. Combi Line Waterman Steamship Corporation	(additional claimants to portions of registry funds)

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PRELIMINARY STATEMENT

The petition for a writ of certiorari is to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming, *per curiam*, a judgment from the United States District Court for the Eastern District of Louisiana ordering repayment, to the victims, of monies exacted from them pursuant to the lighter royalty clauses of a collective bargaining agreement. The said clauses had been determined to be unlawful by the National Labor Relations Board (hereinafter "NLRB" or "the Board"). This opposition is filed on behalf of the four companies from whom most of the illegal royalty monies were exacted and to whom, consequently, most of the restitution was ordered made, namely: Central Gulf Lines, Inc. ("Central Gulf"), Great Southern Paper Company ("Great Southern"), International Navigation, Ltd. ("INL"), and Pioneer Shipping and Forwarding Company, Limited ("Pioneer").[1] The above listed companies were Intervenors-

[1] Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, Respondents represent the following entities are parent corporations, subsidiaries and affiliates of each Respondent:

a. Central Gulf Lines, Inc. is a wholly-owned subsidiary of International Shipholding Corporation.

b. International Navigation, Ltd. is a wholly-owned subsidiary of International Paper Company.

c. Great Southern Paper Company is a division (not separately incorporated) of Great Northern Nekoosa Corporation, a Maine corporation. The affiliates of Great Northern Nekoosa Corporation that are not wholly-owned, directly or indirectly, by that corporation are Envases Industriales de Costa Rica, S.A., incorporated in the Republic of Costa Rica, Industria Panamena de Papel,

Appellees in the proceedings below, are Respondents herein, and are sometimes referred to as the Fund-Claimant Respondents to distinguish them from the NLRB and other respondents.

COUNTERSTATEMENT OF THE CASE

The Fund-Claimant Respondents substantially accept Petitioners' Statement of the Case except to add the following, particularly with regard to the Unions' request for a modification of the district court's order enjoining collection of the royalty funds.

On March 15, 1976, the United States District Court temporarily enjoined the Unions from enforcing, with respect to cargo from Panama City, Florida, the lighter royalty clauses of a collective bargaining agreement pending a determination of the legality of the provisions by the

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(Footnote 1 continued)

S.A., incorporated in the Republic of Panama, and Leaf River Forest Products, Inc., a Delaware corporation, 95% owned by a wholly-owned subsidiary of Great Northern, and 5% owned by Kymi Kymmene Oy, a Finnish paper company.

d. Pioneer Shipping and Forwarding Company, Limited, is a wholly-owned subsidiary, the Altimate Holding Company being Reed International T.L.C., which is incorporated in the United Kingdom. Reed International T.L.C. has the following non-wholly-owned affiliates:

Compagnie Europeenne de Publication	(25% owned)
Tri-wall Container (Europa) BV	(50% owned)
Adshell Ltd.	(50% owned)
Industrial and Trade Fairs Holdings Ltd.	(40% owned)
Kings Reach Investments Ltd.	(39% owned)

NLRB. Following the court's injunctive order, the Unions and New Orleans Steamship Association ("NOSSA") made a request to have the royalty payments continue during the pendency of the litigation (on the merits of the unfair labor practice charges before the Board) and to have such payments paid into the court's registry in lieu of an injunction (R. 103, 112).

Subsequently, on June 28, 1976, the court ordered that collection of the royalties not be enjoined, but, instead that all funds derived therefrom be deposited in the registry of the court pending final determination of the merits by the Board. In modifying the injunction, the court reasoned that a registry fund appeared "to be the most equitable means to maintain the status quo pending final determination by the Board." (Petitioners' Appendix F at 18a).

Petitioners would have this Court believe that the district court's modification sanctioned a disbursement of the registry funds to the Unions, regardless of whether or not the Unions prevailed on the merits before the NLRB. The clear intent of all parties, reflected by the memoranda to Judge West in support of the modification, was that the registry fund monies could be available to the Unions *if and only if* they prevailed before the Board on the issue of whether the royalty provision was legal. Otherwise, the very act of obtaining a temporary injunction would have been superfluous, and there would have been no need for a registry fund. The Unions urged as much in their April 26, 1976 memorandum proposing a modified order:

> In order to protect the interest of the employees for whose benefit the royalty is collected, it is necessary to put the money royalty on the side. In the event the Unions prevail the money would be immediately available for distribution in accordance with the Collective Bargaining Agreement. If the Unions do not prevail, the *money can be returned with interest to those who have paid it.* Everyone is protected and there can be no chance of injustice. (emphasis added).

(Petitioners' Appendix E at 15a).

Petitioners' brief to this Court contends the Unions "prevailed" before the NLRB on the "crucial issue of reimbursement" (Petition for Writ at 5, n. 6), therefore the funds, illegally exacted from the fund contributors, should now be given to the Union. Petitioners' assertion is based on a footnote of the Administrative Law Judge's ("ALJ") opinion regarding a reimbursement request:

> The General Counsel requests an affirmative order requiring reimbursement to the "original payor" of money paid as royalties pursuant to the lighter royalty provision of the NOSSA-ILA contract. The "original payor", I take it, refers to the stevedoring and shipping companies who were liable for such payments under the contract which NOSSA executed on their behalf with Respondents. As the royalties paid by these employers were not involuntarily exacted from them by unlawful means but were sanctioned by the contract to which they voluntarily agreed, I deem it inappropriate to grant the General Counsel's request. See, *International Union of Operating Engineers, Local Union No. 12 (Acco*

> *Construction Equipment Co.*), 204 NLRB 742, note 3 (1973). A similar request for reimbursement of royalties made by the Charging Party is likewise denied.

Petitioners clearly misconstrue the intent of this footnote. It cannot be referred to in isolation, but must be interpreted in light of the entire decision to properly understand both its import and limitations. The ALJ's recommended decision ordered the Unions "...to cease and desist from maintaining, enforcing or giving effect to the lighter royalty provision..." (R.173). The ALJ further found that prior to the district court order establishing the registry fund "...lighter royalties of $2 a long ton ha[d] been paid pursuant to the lighter royalty clause on over 100,000 tons of cargo emanating from the Port of Panama City..." (R. 163, reverse side). The decision was adopted *in toto* by the Board. As clarified by the Board's attorney before the Fifth Circuit, the ALJ made no disposition whatsoever with respect to the funds in the court registry, but instead declined to order reimbursement of only those funds paid to the Unions prior to issuance of the temporary injunction order of March 15, 1976, and not deposited in the district court registry pursuant to the June 28, 1976 order.

> In short, the Board viewed the unfair labor practices as having terminated with the issuance of the Section 10(*l*) injunction and, in fashioning appropriate relief, the Board did not have occasion to consider the disposition of the substantial sum of monies accumulated in the escrow during the litigation.

(Fifth Circuit Brief for Petitioner-Appellee, NLRB, at 20).

With minor exceptions,[2] not essential to decision on the writ petition, Respondents accept the remainder of Petitioners' Statement of the Case regarding proceedings in the district court. It should be noted that the Fifth Circuit's *per curiam* affirmance without written opinion was not rendered pursuant to that court's summary calendar procedure, but instead was issued only after full oral argument.

REASONS FOR DENYING THE WRIT

The Issue Presented For Review Is Without Merit Since There Is No Conflict Between Either The District Court's Distribution Order And The Board's Order Or The Policies Of The Labor Management Relations Act.

Petitioners' brief assumes the NLRB had custody of and jurisdiction over the lower court's registry funds. This is clearly erroneous.

The NLRB, in its unfair labor practice proceeding, did not ever consider it had jurisdiction over the monies collected by the district court. As stated by the Board's attorneys to the Fifth Circuit, "...the Board did not have occasion, in fashioning a remedy, to consider the $1.1 million paid into escrow after the Section 10(*l*) injunction issued..." because "...the Board only found violations in

[2] *E.g.*, contrary to the statement on page 4 of the petition for writ, the funds in the court's registry earned no interest at all until on or about September 27, 1978, and drew only 5¼% interest thereafter until about December 13, 1979, when the major portion of the monies was first invested in treasury bills.

connection with the Union's enforcement of the royalty provisions during the period from about October 1, 1974...until the district court's order...in the 10(*l*) injunction proceeding." (Fifth Circuit Brief for Petitioner-Appellee, NLRB at 20). In other words, the Board only exercised jurisdiction over those monies collected prior to the issuance of the temporary injunction order on March 15, 1976, since it considered the unfair labor practices as having terminated with the March 15 issuance of the Section 10(*l*) injunction.

Further, any effort by the Board to exert jurisdiction over the registry fund would have been futile, because the fund is clearly within the exclusive jurisdiction of the district court. The status of property held by a federal court is within that court's exclusive jurisdiction "...so far as restriction of the power of other courts is necessary for the federal court's appropriate control and disposition of the property." *Mid-Jersey National Bank v. Fidelity-Mortgage Investors*, 518 F.2d 640, 643 (3rd Cir. 1975), citing *United States v. Klein*, 303 U.S. 276, 281 (1938). The federal court ordering creation of the funds is responsible for its distribution and not an Administrative Law Judge, as suggested by Petitioners. The distribution is an equitable proceeding within the exclusive jurisdiction, expertise and discretion of the federal court. The lower court stated as much in its *Reasons for Judgment* and *Order* (Petitioners' Appendix E at 16a):

The Unions and NOSSA argue that the funds

should be returned to the NOSSA-ILA Pension Fund as called for by the collective bargaining agreement. Such a result would, in the opinion of this Court, defeat the purpose of Judge West's order that the funds be deposited in the court's registry. As indicated above, that order was in response to urgings of NOSSA and the Unions. It was an exercise of the court's equitable powers to protect the interests of all parties, pending the Board's adjudication. And, as can be seen from the quoted portions of the briefs of NOSSA and the Unions, those parties asserted that in the event the Board found the royalty unlawful, the funds should be returned to those who paid them.[3] Equity demands nothing less. It is contended that the Board had the issue of "reimbursement" before it and decided not to grant such relief. That contention is based on a footnote

[3] Both NOSSA and the Unions argued for the creation of a registry fund citing relief in the way of an equitable disbursement to the payors should the fund be found unlawful. NOSSA's motion in support of a registry fund included the following argument (See Petitioners' Appendix E at 15a):

> Conversely, the continuance of royalty payments during the pendency of this litigation, conditioned upon an escrow of the royalty sums in the Registry of Court or as otherwise directed by this Court, would result in no injury to the charging parties since the sums of money paid monthly would all be available to those charging parties at the end of this litigation should the result be favorable to the NLRB.

The Unions put forth the same argument in different language in their April 26, 1976 memorandum:

> In order to protect the interest of the employees for whose benefit the royalty is collected, it is necessary to put the money royalty on the side. In the event the Unions prevail the money would be immediately available for distribution in accordance with the Collective Bargaining Agreement. If the Unions do not prevail, the money can be returned with interst to those who have paid it. Everyone is protected and there can be no chance of injustice.

> in Administrative Law Judge Leff's opinion. Whatever might be the result if the Administrative Law Judge's footnote concerning "reimbursement" were construed in any other way, the court does not construe it as applicable to the funds deposited in the registry of the court and thus gives it no effect with respect to the issues now before the court.

Funds held by the court *in custodia legis* are considered as the *res* of a trust. "The court acts as trustee and is charged with the duty of determining the beneficiaries..." *Mid-Jersey, supra*, 518 F.2d at 643. Further, the disposition of an equitable fund is entirely within the discretion of the court that created it and can only be reversed for an abuse of that discretion. *Willametz v. Susi*, 489 F.2d 364, 366 (1st Cir. 1973).

The court below ordered an equitable distribution of the funds to "those who incurred the unlawful expense" (*Reasons for Judgment*, Petitioners' Appendix E at 17a). The court's return of the monies to the contributors was clearly within its equitable discretion and not an abuse of power.

The actions of the district court are not in conflict with *Sears, Roebuck & Co. v. Carpet, Linoleum, Soft Tile Layers, Local 419*, 397 U.S. 655, *reh'g denied*, 399 U.S. 917 (1970), as suggested by Petitioners. The 10(*l*) injunction proceeding, commenced by the Acting Regional Director of the NLRB, sought and was properly limited to a protection

of the "public interest" as required by *Sears*. The Fund-Claimant Respondents did not attempt to intervene (and could not properly have intervened) on the merits of injunctive relief.

The injunction terminated *by operation of law* (See, *Sears, Roebuck*, 397 U.S. at 658-659), in 1978 when the NLRB issued its Decision and Order striking down the lighter royalty exactions as unlawful. All that remained for the trial court after termination of the 10(*l*) injunction was the purely ministerial duty, after the Board order became final, of dissolving the injunction.

The creation of the registry fund commenced what may be considered in effect to be a distinct secondary proceeding, not directly a portion of, but ancillary to the Section 10(*l*) injunction proceeding. The registry fund proceeding began when Judge West exercised his general equitable powers to convert his original injunction, against payment of the lighter royalties to the Unions, into an order that the royalties continue to be collected and held in the registry of the court to preserve the *status quo* pending final Board determination.

The registry fund proceeding survived the "by operation of law" termination of the 10(*l*) injunction because the district court, having drawn the monies into its custody and control, retained jurisdiction over distribution of the funds. It is not until the litigation reached this point that the Fund-Claimant Respondents intervened in

the ancillary proceeding to assert an interest in the registry fund.

> It is settled that where, in the progress of a suit in federal court, property has been drawn into the court's custody and control, third persons claiming interest in or liens upon the property might be permitted to come into that court for the purpose of setting up, protecting and enforcing their claims,—although the court could not consider or adjudicate their claims if it had not impounded the property. Power to deal with such claims is incident to the jurisdiction acquired in the suit wherein the impounding occurs, and may be invoked by a petition to intervene pro interesse suo, or by dependent bill. But, in either case, the proceeding was purely ancillary.

Hoffman v. McClelland, 264 U.S. 552, 558 (1924).

The ancillary proceeding was not one in which any "relief" under Section 10(*l*) was sought or obtained. By the time of intervention there was no longer a question of a "public interest" for the Board to protect. That had already been resolved. The only question remaining was a determination of the purely private rights of the parties laying claim to the monies. These rights could be and were decided by the district court without any impingement whatsoever upon the jurisdiction, authority or remedial powers of the NLRB.

The trial court acted within its own general equitable

power and responsibility to decide ownership of a fund the court had, by its order, created. This equitable power is recognized by statute. The deposit and withdrawal of monies paid into a registry fund is governed by the provisions of 28 U.S.C. §§2041 and 2042. Section 2042 provides that any claimant entitled to money in the fund has a right to petition the court for an order directing payment to him upon proof of the right thereto.

Just as the NLRB's jurisdiction should be protected against encroachment by courts, no impingement should be permitted upon the district court's right to exercise exclusive power over a judicially created fund—a power clearly recognized by the Board to be beyond that agency's sphere. Petitioners should not be allowed to disturb this established and appropriate balance of power between the courts and federal agencies.

The district court, vested with exclusive jurisdiction over the equitably-created fund—jurisdiction the NLRB disclaims—was clearly within its discretion in ordering disbursement to those parties who bore the expense of the illegal payments. Accordingly, since there is no conflict between the district court's distribution order and the powers of the NLRB or the policies of the Act, there is no substantial federal question to be decided and this Court should deny the petition for a writ of certiorari in this case.

There Is No Closely Related Case Pending Before This Court.

Petitioners claim a writ should issue herein so that this case may be considered simultaneously with *Shepard v. NLRB*, __ U.S. __, No. 81-1627, 50 U.S.L.W. 3908 (May 18, 1982), in which a writ was granted on May 17, 1982. Petitioners contend the cases warrant simultaneous consideration because the identical question raised by *Shepard* was decided by the Board in adjudicating the unfair labor practice charges in the instant case.

The only similarity between the cases is that the Board found certain agreements violative of Section 8(e) of the Act. The issues on review in each case are distinctly dissimilar. The issue in the instant case is not whether the Board abused its discretion, which is the issue in *Shepard*; rather, it is whether the district court abused its discretion in distributing monies held in its registry, in an escrow account created through its equitable powers.

In *Shepard*, the Board declined to order reimbursement to various companies for payment of Union expenses upon a finding that the "hot cargo" agreement requiring such payments violated Section 8(e) of the Labor Management Relations Act. That case involved the usual type of Section 10(*l*) injunction proceeding, in which no registry fund was created by a federal court; no challenge of the court action has been brought to this Court. It is only the exercise of the NLRB's discretion that is questioned in *Shepard*.

In the instant case, the issue is not whether there was an abuse of discretion by the Board in fashioning a remedy; the Board's decision was never appealed. Rather, the question at hand is the nature and extent of a federal court's jurisdiction over monies it impounded for equitable reasons.

Since the *Shepard* case does not involve an analogous situation, much less a closely related issue, there is no need, indeed no reason, to consider these cases simultaneously, or to consider this case at all.

CONCLUSION

For the above and foregoing reasons, it is respectfully urged that the petition for a writ of certiorari filed by the Petitioners, General Longshore Workers, ILA, Locals 1418 and 1419, should be denied.

Respectfully submitted,

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Office - Supreme Court, U.S.
FILED
AUG 30 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2384

In the Supreme Court of the United States

October Term, 1981

GENERAL LONGSHORE WORKERS, ILA
LOCALS 1418 and 1419,
Petitioners,

vs.

FALLON W. BENTZ, Acting Regional Director of the Fifteenth Region of the NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

GREAT SOUTHERN, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT PANAMA CITY PORT AUTHORITY IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err when it affirmed, per curiam, the District Court's order for the distribution of funds impounded in the Court's equitable jurisdiction in a manner consistent with an NLRB order, so as not to give full force and effect to, or allow the Unions to benefit from, a contractual arrangement previously determined to be illegal and enjoined by both the Court and the NLRB?

PARTIES TO THE PROCEEDINGS BELOW

Fallon W. Bentz, Acting Regional Director, Region 15, National Labor Relations Board

General Longshore Workers, ILA Local Nos. 1418 and 1419 (now merged—Local 3000)

New Orleans Steamship Association
Panama City Port Authority
Great Southern Paper Company
Pioneer Shipping and Forwarding Company, Limited
International Navigation, Limited
Central Gulf Lines, Inc.
Lykes Brothers Steamship Company, Inc.
Combi Lines
Waterman Steamship Corporation
NOSSA—ILA Royalty Escrow Account
Alley and Alley, Chartered
Sale, Bryant, Thompson and Kurvin, Chartered

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No. 81-2384

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT PANAMA CITY PORT AUTHORITY IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

A re-statement of the case is necessary due to omissions in the statement of the Petitioners (hereafter "Unions"). The Unions' statement of the case contains, and its petition is entirely premised upon, characterizations as to matters taken out of context from a decision of the National Labor Relations Board ("NLRB") which characterizations are inconsistent with that decision when viewed as a whole and which characterizations were re-

jected below by the District Court, by a unanimous Fifth Circuit Court of Appeals' panel, and by the NLRB General Counsel on behalf of the NLRB. The Unions' statement also fails to discuss significant facts as to certain claimants (Florida shippers) involved, the nature of their interests, the nature and timing of their participation (or lack thereof in the NLRB and District Court proceedings) and the nature of their uncontradicted, adjudicated interests.

The Charge of Illegality and Injunctive Proceeding

This litigation was instituted in April 1975 when this Respondent, Panama City Port Authority ("Port Authority"), filed charges against the Unions with the National Labor Relations Board ("NLRB"). The charges included the charge that the Unions were violating Section 8(e) of the National Labor Relations Act ("Act"), 29 USC Section 158(e), in that the Unions had entered into contracts or agreements with the New Orleans Steamship Association ("NOSSA") whereby NOSSA employer members had ceased or refrained from, or agreed to cease or refrain from, doing business with Florida shippers utilizing the Panama City Port unless a $2.00 per ton royalty was paid on certain shipments.

The litigation in the U.S. District Court was instituted in October 1975 when Fallon W. Bentz, Acting Regional Director, on behalf of the NLRB, petitioned the U.S. District Court for injunctive relief stating that he had found reasonable cause to believe that the Port Authority's charges were true. On March 15, 1976, the U.S. District Court enjoined the Unions from enforcing the illegal financial penalty with regard to barges emanating from Panama City and passing through the Port of New Orleans (Unions'

Appendix, "App.", G). Following the Court's injunctive order, both the Unions and NOSSA made a request to have the royalty payments paid into the Court's registry in lieu of an injunction. Regarding this procedure, the Unions represented to the Court that:

> If the Unions do not prevail, the money can be returned with interest to those who have paid it. Everyone is protected and there can be no chance of injustice.

Subsequently, on June 28, 1976, the Court modified its injunction to require that the royalties be paid into the registry of the Court pending final determination of the matter by the NLRB (App. F) which was then considering the merits of the unfair labor practice charges filed by the Port Authority.

The Administrative Finding That the Actions of the Unions Until Enjoined Were Illegal

Following the Court's injunctive hearings, the parties (i.e., the NLRB General Counsel, the Unions, NOSSA and the Port Authority) entered into a stipulation whereby the unfair labor practice charge came on for determination before an administrative law judge based upon a stipulated record.[1] In September 1977, a decision was rendered by an administrative law judge holding that by enforcing the lighter royalty provision, the Unions had engaged in unfair labor practices affecting commerce within the meaning of 29 USC Section 158(e). The administrative law judge found that it was of "no exculpatory significance" that NOSSA, for its New Orleans employer members, vol-

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1. The Unions' impoundment representations were not presented or discussed in the NLRB proceeding. The impoundment and the specific impoundment accounting were exclusively handled by the District Court.

untarily agreed to the penalty provision because the public policy behind Section 8(e) is concerned with "all other persons who might be affected by such an agreement", noting that where the cost of the penalty was "passed along" to shippers (as here), it constituted a financial deterrent to doing business at a non-ILA port such as Panama City.

The administrative law judge recognized, based upon the stipulation of the parties, that the Unions had been able to give "full force and effect" to the provision from October 1, 1974 only "until enjoined." In finding the Unions' actions to be illegal and in violation of Section 8(e) of the Act, the administrative law judge's actual holding was:

> It follows that Respondents have violated Section 8(e) of the Act by their conduct in maintaining and giving full force and effect to the agreement *until enjoined* from further doing so by the Court's order in the Section 10(l) injunction proceeding. . . . [Emphasis added]

Accordingly, the administrative law judge in 1977 plainly found that the District Court through its 1976 orders had prevented the Unions from continuing what had been their illegal course of conduct since 1974.

The NLRB Order of Continuing Injunctive Relief

Turning to the issue of relief, the administrative law judge recommended that the District Court's injunctive order be transformed into a permanent injunction requiring the Unions to "[c]ease and desist from maintaining, giving effect to, enforcing or reaffirming" the illegal provisions. While the Unions rely heavily here on one sentence taken from a footnote in the decision of the administrative

law judge regarding "reimbursement," their citation to that footnote is out of context and their reliance misplaced. The cited footnote language referred to a short request of the NLRB General Counsel at the close of his brief. The "reimbursement" request was for an order for reimbursement to the "original payor" of monies paid "as royalty pursuant to the illegal lighter royalty provisions" commencing six months prior to filing of the 1975 charges (i.e., in October 1974—18 months prior to the injunction) pursuant to Section 10(b) of the Act. The administrative law judge, as aforementioned, viewed the illegal effect of the agreement as having been terminated by the injunction; he also viewed the request for administrative reimbursement of monies paid "as royalties pursuant to" the contract to the "original payor" to relate only to NOSSA members who were party to the Unions' New Orleans contract containing the illegal provisions. Thus, the cited footnote made no reference to impounded monies or to interests of members of the public such as the Florida shippers who were not NOSSA members and not parties to the NLRB proceeding but who proved in court that the bulk of the payments were being "passed along" to them.[2]

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2. The administrative law judge stated in pertinent part in the footnote cited by the Unions:

> The General Counsel requests an affirmative order requiring reimbursement to the "original payor" of money paid as royalties pursuant to the lighter royalty provision of the NOSSA-ILA contract. The "original payor", I take it, refers to the stevedoring and shipping companies who were liable for such payments under the contract which NOSSA executed on their behalf with Respondents. As the royalties paid by these employers were not involuntarily exacted from them by unlawful means but were sanctioned by the contract to which they voluntarily agreed, I deem it inappropriate to grant the General Counsel's request. . . .

Notably, the authority relied upon by the administrative law judge for the denial of an order requiring administrative reimbursement of illegal collections to NOSSA members had been rejected on that very point. *See Acco Construction Equipment, Inc. v. NLRB*, 511 F.2d 848 (9th Cir. 1975), *rev'g in part* 204 NLRB 742 (1973).

The NLRB in 1978 adopted the administrative law judge's decision without comment.[3] The Unions did not appeal that order.

Ancillary Proceedings for Distribution of the Funds

Proceedings were again instituted before the District Court and, at the outset, the Port Authority filed a claim stating that the Court sat as statutory trustee holding the money deposited in the registry for the rightful owners and that the rightful owners were those who bore the burden of the payments including the Florida shippers to whom the cost of the penalty had been passed along. Shortly thereafter, Great Southern Paper Company ("Great Southern"), and International Navigation Ltd. ("INL") sought to intervene and filed claims on the impounded money. Their claims stated that the illegal royalty cost had been "passed on" by the NOSSA members in New Orleans to these Florida shippers. These claimants claimed the majority of the money impounded and their claims were ultimately established before the Court below.

After permitting the foregoing claimants and others to intervene to assert a claim as to the funds in the reg-

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3. Because the administrative law judge had not spoken regarding the distribution of the impounded monies, the Port Authority requested through exceptions to his order that the NLRB take "administrative notice" of the amounts impounded and to further note that "NOSSA members [had] passed along the $2.00 per ton royalty to other employers such as Great Southern," a Florida shipper. NOSSA contended that that "pass along" question was "not properly before the Board." The NLRB itself, on review, did not indicate to what extent, if any, that administrative notice of the status of the Court impoundment proceeding or a statement by the NLRB as to distribution of the impounded monies would be appropriate. When this failure to provide for the disposition of impounded monies was noted again in a motion for clarification, the motion was denied.

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istry of the Court, and after considering the briefs and positions of all the parties, the District Court entered an order on April 6, 1979 which vacated the 1976 injunction order (as modified for impoundment) and provided for the commencement of ancillary proceedings to disburse the funds in the Court's registry (App. E). The District Court found that the injunction had been modified to impound the funds into the Court's registry in response to "urgings of NOSSA and the Unions" and that the impoundment was "an exercise of the Court's equitable powers to protect the interests of all parties, pending the Board's adjudication." The Court noted that at the time of the impoundment order, both NOSSA and the Unions had asserted "that in the event the Board found the royalty unlawful, the funds should be returned to those who paid them." The Court concluded that "[e]quity demands nothing less." The Court ordered the funds to be returned to those who incurred the expense, finding no conflict with the NLRB order in this regard. The Court referred the case to the United States Magistrate to serve as special master to conduct further proceedings with respect to the determination of the persons who incurred the expense of the royalty, the amount thereof as to each person, and to file a report and recommendation with respect thereto.

After publication of notice, discovery proceedings and audit proceedings, the U.S. Magistrate issued a special master finding and recommendation (App. D). Regarding the funds paid into the Court's registry, the Magistrate found that the majority of the funds paid in were "attributable and should be disbursed to" the Florida shippers. Neither the NLRB nor any claimant maintained an objection to the Magistrate's' findings as to disbursements. Accordingly, judgment was entered upon the schedule of distribution set forth by the Magistrate which judgment was

unobjected to by the claimants and the NLRB (App. B and C). From this judgment, the Unions have appealed. The Unions have raised no opposition to the specific distributions to the specific parties but rather contest only the right of any party other than the Unions to recover anything from the fund. The Unions' appeal to the Fifth Circuit Court of Appeal was opposed by the NLRB General Counsel on behalf of the NLRB on the ground that the Court's order was just and proper and consistent with the NLRB order and the appeal was rejected with the Court of Appeals entering a unanimous *per curiam* affirmance (App. A). Following the affirmance by the Court of Appeals, the District Court distributed the impounded monies to those determined to have borne the burden, thereby completing the equitable process which had been commenced by the Court's 1976 injunction order.

SUMMARY OF ARGUMENT

The order below of the District Court distributing impounded monies was consistent with and not in conflict with the NLRB's order permanently enjoining the violation and was affirmed by a unanimous Court of Appeals' panel without opinion due to a lack of error and precedential value. The Court's order was both fair and accurate and did not award affirmative relief, but rather served traditional considerations by restoring the status quo and promptly eliminating commerce obstructions. This case, which deals with a court's return to the rightful owners of enjoined and impounded payments, does not raise an important federal question and is not closely related to a pending case that deals with review of an administrative agency's remedies for pre-injunction payments.

REASONS FOR NOT GRANTING THE WRIT

I. THIS CASE DOES NOT INVOLVE AN IMPORTANT FEDERAL QUESTION WHICH SHOULD BE DECIDED BY THIS COURT

The petitioning Unions contend that this case presents an important question concerning the relationship between a district court's authority to grant relief under Section 10(l) of the Act and the NLRB's authority to determine the appropriate remedy for unfair labor practices. This argument is premised on the Unions' argument that when the Court ordered "reimbursement" of the funds impounded, the "effect of the district court's ruling was to award permanent affirmative relief to those who had paid the royalties notwithstanding that the NLRB had *denied the same relief* which the district court awarded" (Petition at 6-7, emphasis added). As shown in the foregoing Statement of the Case, this was viewed below as an erroneous characterization of the NLRB order, by the NLRB General Counsel on behalf of the NLRB and by the District Court, which was affirmed by a unanimous Court of Appeals' panel below. The Court of Appeals' decision was a *per curiam* affirmance without opinion which, pursuant to Local Rule 21, cited therein (App. A), reflected a unanimous determination of no error of law and that an opinion would have "no precedential value." Notably, the Unions have cited to no pending cases and to no cases in over 20 years of enforcement in which a similar issue of a purported conflict between a district court injunction and an NLRB order confirming and permanently enjoining a violation has ever arisen. What the Unions present is plainly an issue evolving from the Unions' self-serving construction of a footnote in an administrative

order in a manner consistent with only their private interests, which construction was concurrently rejected by the lower courts and the agents charged with enforcement of the Act.

To distribute the impounded royalties as the Unions contend would make a mockery of the judicial and NLRB proceeding. The District Court originally, in 1976, found the evidence sufficient to enjoin the enforcement of the illegal royalty provision and the propriety of that determination was later confirmed by the NLRB in 1978. The administrative law judge's order found that the Unions committed unfair labor practices "until enjoined" and the one sentence from a footnote cited by the Unions plainly did not purport to require the Court to make a disposition so as to give full force and effect to the illegal royalty provision. The order, when viewed as a whole, recognized that the District Court's equitable processes had prevented the Unions from giving full force and effect to the illegal provisions and accomplishing their unlawful objectives as to certain of the royalties and the administrative order permanently prohibited the Unions from that date on from maintaining or giving effect to or reaffirming the illegal provisions. The brief reference to administrative "reimbursement" in a footnote did not refer to impounded monies which had been equitably prevented from traveling their illegal course.

Accordingly, the District Court was correct when it held that it did not construe the administrative law judge's footnote as being applicable to the funds in the Court's registry. The Court of Appeals was also correct when it affirmed that order *per curiam* and held that the appeal did not even merit an opinion. The distribution of the funds to those who bore their expense during the litigation

was not an award of "permanent affirmative relief"; rather, it was simply a completion of the original standard Section 10(l) injunction designed to restore the status quo. As the Unions' own cited authority states, "restoration of the status quo" is an appropriate and basic consideration to a district court's function of providing temporary relief. See *NLRB v. Aerovox Corp.*, 389 F.2d 475 (4th Cir. 1967); *Minn. Mining & Mfg. Co. v. Meter*, 385 F.2d 265 (8th Cir. 1967); *Angle v. Sacks*, 382 F.2d 655 (10th Cir. 1967) (cited by Unions, Petit. at 8). The decisions of the courts below effectuated public policy by restoring the status quo and thereby adhering to the strong Section 10(l) policy of injunctive relief to assure "the prompt elimination of the obstructions to the free flow of commerce." 1 Legis. His. of LMRA at 433 (cited by Unions, Petit. at 7).

The Unions nevertheless seek to suggest that this case involves an important intrusion into the NLRB's jurisdiction in conflict with the NLRB's order, which as shown above is not the case. The Unions' reliance on *Sears, Roebuck and Co. v. Carpet, Linoleum, Soft Tile Layers, Local No. 419*, 397 U.S. 655 (1970), is misplaced. From *Sears*, the Unions ultimately argue that the District Court "should have held the funds in its registry *solely* for the purpose of ensuring that those funds were available to be distributed in accordance with the mandate of the NLRB" (Petition at 9). It is submitted, first, that the Court did distribute the funds in accordance with the NLRB mandate. The mandate of the NLRB was that the Unions had engaged in illegal practices until the District Court enjoined and began to impound the royalties and that the Unions should continue to cease and desist from giving force or effect to or reaffirming the royalty provisions. The decision of the District Court and the per curiam affirmance by the Court of Appeals below are consistent with the NLRB order.

Second, consistent with *Sears*, the District Court did dissolve its Section 10(l) injunction/impoundment order as expired and moot upon notice from the NLRB of its entry of a permanent injunction (App. E). The distribution of the funds already impounded in an ancillary proceeding to restore the status quo and to resolve conflicting claims from numerous parties obviously remained, however. It is a well settled rule of federal practice and equity that where a federal court takes custody and control of property, the court may, irrespective of the other elements of federal jurisdiction, entertain proceedings in which members of the public claiming interest in the property may protect and enforce their claims, which proceedings are considered "ancillary" in nature. See, e.g., *Hoffman v. McClelland*, 264 U.S. 552 (1924); *State of Oklahoma v. State of Texas*, 258 U.S. 574 (1922). Where a fund of money is impounded pursuant to a federal court order requiring that certain allegedly illegal payments be paid into the Court's registry until resolution of litigation, the money is impounded as a result of the exercise of the Court's equitable jurisdiction and the fund is also to be distributed through the exercise of the Court's equitable jurisdiction including appropriate orders to effect distribution to the payors of the illegal charge. See, e.g., *Washington Gas Light Co. v. Baker*, 195 F.2d 29 (D.C. Cir. 1951). Impounded money is considered a deposit *in custodia legis* and is held by the Court in trust for the benefit of whomever it is found to belong and the Court assumes the duty to make the disposition of the fund in ancillary proceedings in conformity with equitable principles. See *Branch v. United States*, 100 U.S. 673 (1879); *Mid-Jersey National Bank v. Fidelity-Mortgage Investors*, 518 F.2d 640, 643 (3d Cir. 1975); *Baxter v. United Forest Products Co.*, 406 F.2d 1120, 1126 (8th Cir. 1969). The distribution proceeding below was "ancillary" to the Section 10(l)

proceeding and the distribution order totally consistent with both equitable principles and the NLRB's order.

Faced with the obvious equity of the Court's decision and lack of pending or past cases suggesting that this case raises an important issue, the Unions finally suggest (Petit. at 11) that Section 10(l) cases are often rendered moot by intervening events citing *McLeod v. General Electric Co.*, 87 S.Ct. 5 (1966), and argue that this case presents "an appropriate vehicle" to review unspecified Section 10(l) issues. There, of course, has never been any issue whatsoever regarding the 1976 Section 10(l) injunction or the standards involved in its issuance raised here. The Section 10(l) proceeding and injunction were entirely proper and were ratified by the NLRB and the Unions have never challenged that determination. This entire appeal turns on facts peculiar to this particular case as resolved in a distribution proceeding ancillary to the original Section 10(l) case and does not provide "a vehicle" for the review of any meaningful Section 10(l) issues. The case presents the Unions' construction of a footnote in an administrative opinion in a fashion consistent with only their private interests and not a question of past, present or future importance to the administration of the Act.

II. THIS CASE IS NOT CLOSELY RELATED OR SIMILAR TO A CASE PRESENTLY BEFORE THE COURT

The Unions erroneously contend that this case is closely related to the case of *Shepard v. NLRB*, No. 81-1627, as to which this Court granted a writ of certiorari. What is in issue in *Shepard* (i.e., the need for administrative reimbursement of pre-injunction payments held by the union), however, is exactly what is *not* an issue here.

And, what is in issue here (i.e., the Unions' nonentitlement to equitably prevented payments) is taken for granted and conceded in *Shepard*. As stated at the outset of Petitioner Shepard's argument in his brief (p. 14), the issue there is as follows:

> The petitioner challenges the Board's denial of a "make-whole" remedy. A reimbursement (make-whole) order would have required the Union and the Contractor Associations to reimburse him for the initiation fees, dues and fringe benefit contributions he was required to pay *when they enforced their illegal hot cargo agreement*. (Emphasis added)

In *Shepard*, there were two "funds" of payments—those illegally enforced (which Shepard seeks "reimbursement" of) and those which after the filing of unfair labor practice charges were equitably prevented by the District Court. As reflected at page 10 of Petitioner Shepard's brief:

> Additionally pursuant to Section 10(l) of the Act, the Board sought and obtained a federal court injunction prohibiting further enforcement of the challenged provisions . . . *Johanson v. Building Material and Dump Truck Drivers, Teamsters Local 36*, Southern District of California, Case No. 79-0086-E.
>
> *Finally, eight months after the petitioner filed his unfair labor practice charges, he was free to cease paying dues and fringe benefits to the Union*. . . [Emphasis added].

Thus what is in issue in *Shepard* is whether there should be NLRB administrative proceedings for reimbursement to employers of *pre*-injunction payments illegally collected by the union when it was able to give full force

and effect to the illegal provision. What is in issue here are solely those payments which were equitably prevented from traveling their illegal course by the District Court. This case involves no question of judicial restrictions to NLRB remedial discretion since the NLRB has not here or otherwise, when confirming a district court's initial Section 10(l) determination of illegality, purported to reward wrongdoing unions by requiring those members of the public protected by the District Court's equitable processes to pay over illegal penalties. Clearly, the Unions seek to reap not only the benefits of their illegal agreement during the pre-injunction period when they enforced their illegal agreement (which is objected to in *Shepard*), but also seek to reap the benefits of their illegal agreement during a period in which they were prevented by the Court from accomplishing their unlawful objectives by requiring the courts to become a party to the arrangement and to give full force and effect to the established, illegal arrangement. This argument goes well beyond what is in issue in *Shepard* and would make a mockery of the Act.

As stated by the Unions, there exists an obvious need for uniform administration of the Act. The result in this case is entirely uniform with other cases in that the Unions, upon an NLRB determination of their illegal actions, have not been allowed to accomplish unlawful objectives through royalties equitably prevented by a district court under Section 10(l). Allowing the Unions to claim the impounded payments as spoils of their illegal actions would destroy the purpose behind Section 10(l) of promptly eliminating commerce obstructions and would cause chaos to the law in general. Those who bore the burden of the impounded payments and have finally benefitted by the Court's return of the equitably collected payments should

not now be required to make penalty payments as a reward to the Unions for their wrongdoing established over six years ago.

III. MATTERS RELATING TO IMPOUNDMENT AND DISTRIBUTION WERE HANDLED EXCLUSIVELY BY THE COURT AND THE DISTRIBUTION ORDERED BY THE COURTS BELOW WAS BOTH ACCURATE AND FAIR

Moreover, assuming, *arguendo*, as the Unions contend that the effect of the District Court's ruling was to award permanent affirmative relief to those who had paid the royalty which thereby conflicted with an NLRB order denying the same relief (which it did not), it is established that there remains no equitable basis whatsoever for making an award of the type sought by the Unions here. In *Inland Steel Co. v. United States*, 306 U.S. 153 (1939), this Court established that a federal court having lawful control of a fund was under a duty to distribute the fund so that the wrongdoer would not be a beneficiary of unlawful payments. There, following an administrative (ICC) determination that certain charges imposed on and paid by a railroad were unlawful, the agency issued a cease and desist order and, pending review of that order, the payments by the railroad were impounded to a separate account. However, while the administrative order was ultimately sustained, the agency in the interim entered a separate order postponing the effect of the cease and desist order by nearly two years. The parties charging the illegal charges claimed that the funds impounded during that period should be paid over to them because there was no operative agency order forbidding the unlawful payments during that period. This Court rejected that contention, holding that restitution should be made to the

rightful claimants even in the absence of any administrative order requiring such payment and even in the face of a clear administrative order postponing the cease and desist requirement. The Court emphasized that the practice had been found to be unlawful and contrary to the public's interest, which led to the equitable impoundment, which finding of illegality was ultimately approved. The Court concluded that even if postponement of the cease and desist portion of the order were operative, the initial finding of unlawfulness was left intact throughout and that in those circumstances "equity and good conscience" required retention of the money by the railroad.

The District Court in impounding illegal charges assumed and properly exercised its duty of making an accurate distribution in accord with equitable principles after detailed proceedings exclusively before it.[4] The finding of illegality has been intact since March 1976 and the purpose of Section 10(l) of promptly eliminating commerce obstructions, as well as equity and good conscience, support the distribution order.

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4. Here, claims on the monies were litigated only before the District Court. The NLRB conducted no proceedings to examine specific claims on any monies. Thus, there were numerous matters including the Unions' original 1976 representations regarding impoundment, the specific impoundment accounting, and the uncontradicted evidence of numerous "pass-along" interests which were not present or discussed in the NLRB proceedings. The Court's impoundment and distribution processes were detailed and resulted in the resolution, without objection, of numerous conflicting claims. The resolution was both fair and highly accurate.

CONCLUSION

For the reasons set forth above, Respondents pray that the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,

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